

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

515
4-7-70
JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,398; 23,980

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
Local 35, Appellant

v.

THE WASHINGTON POST COMPANY, *Appellee*

On Appeal from the Decision of the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 8 1970

Nathan J. Poulos

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JOINT APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Relevant Docket Entries

1968

July 11—Complaint, appearance: Exhibit "A" filed

Aug. 1—Answer of deft. to complaint; c/m 8/1/68 appearance of Royall, Roger & Wells by Stuart Rothman Exhibits A thru D. filed

Oct. 29—Motion of deft. for summary judgment; notice; statement; affidavit; exhibits 1, 2, 3, 4, 5, 6, 7, 8 & 9; P & A; c/m 10/29/68 M.C. filed

1969

Jan. 13—Opposition of plttfs. to deft's. motion for summary judgment; c/m 1/13/69. filed

Jan. 13—Cross-motion of plttf. for Summary Judgment notice; Statement; P & A; Exhibits A-1, A-2, A-3, B, C, D, E, F, G, H, I, J, K c/m 1/13/69; M.C. filed

Feb. 18—Amended complaint. c/m 1/27/69 filed

Feb. 20—Answer of deft. to amended complaint; c/m 2/20/69. Exhibit E. filed

Mar. 11—Opposition of Deft to Plttf's cross-motion for summary judgment; P & A; Exhibits A & B; c/m 3/11/69. filed.

Apr. 15—Motion of deft. for summary judgment and motion of plttf. for summary argued and taken under advisement. (Rep: Doyne Spencer) Robinson, J.

Jun. 9—Order granting motion of deft. for summary judgment and dismissing complaint; Motion of plttf. for summary judgment denied (n) Robinson, J.

July 7—Notice of appeal by plttf. from order of 6/9/69

Nov. 26—Motion of plttf. under Rule 60(b) to vacate order granting summary judgment and remand case for new arbitration hearing; statement; Exhibits 1 thru 6; P & A; c/m 11/26/69 M.C. filed

Dec. 8—Opposition of deft. to motion under Rule 60(b) and motion for judgment on the pleadings; statement; c/m 12-8-69; Exhibit 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L; P & A. filed

Dec. 23—Reply of plttf. to deft's opposition to plttf's motion under Rule 60(b) to vacate judgment enforcing arbitration award; c/m filed

1970

Jan. 28—Memorandum and Order denying plttf's motion pursuant to Rule 60(b) to vacate order granting summary judgment and remand case for new arbitration hearing. (N) (signed 1-23-70) Robinson, J.

Feb. 16—Notice of appeal by plttf. from order of 1-28-70;

Mar. 2—Record on Appeal delivered to USCA;

AMERICAN ARBITRATION ASSOCIATION, ADM'R
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
WASHINGTON-BALTIMORE NEWSPAPER GUILD, LOCAL 35
and

THE WASHINGTON POST COMPANY
Case Number: 14 30 0722 67

Award

The Undersigned, constituting the Arbitrator to whom was submitted the matter in dispute between the parties above-named, having heard the allegations and received the witnesses and proofs, makes the following AWARD:

The discharge of Mrs. Winzola McLendon was not for willful neglect of duty or gross misconduct, but it was for good and sufficient cause.

April 12, 1968

/s/ EMANUEL STEIN
Emanuel Stein, Arbitrator

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

On the 15th day of April, 1968, before me came Emanuel Stein, to me known, and known to me to be the person described in and who executed the within instrument, and he acknowledged to me that he executed the same.

/s/ JEANNIE R. McCLOSKEY
Jeannie R. McCloskey

Notary Public, State of New York
No. 31-2605705
Qualified in New York County
Commission Expires March 30, 1969

Opinion

This proceeding arises out of a dispute between the above-named parties, hereinafter called "the Guild" and "the Publisher" respectively, over the propriety of the discharge by the Publisher of Mrs. Winzola McLendon, a reporter. As stated at the hearing by counsel for the Publisher, "The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement." (Tr., 4) These provisions, it is said (Tr., 3) are those of Article VI, Section (3) of the collective bargaining agreement which, so far as here relevant, provides:

No employee shall be discharge except for good and sufficient cause. . . . Two weeks' notice in advance of discharge shall be given to employees with six (6) months or more of continuous employment except in cases of discharge for willful neglect of duty or gross misconduct. Any such employee upon receipt of notice of discharge, or upon discharge where no notice is given, may apply to the Standing Committee so that the Committee may confer with The Post in the case. . . .

Conferences regarding any discharge shall proceed with due diligence and shall be concluded within thirty (30) days after the notice of discharge or after discharge where no notice is given. If, upon conference, The Post and the Guild are unable to agree as to the proper disposition of the case . . . the matter may be referred by the Guild to arbitration under Paragraph (2) of Article XVII of this Agreement. . . . If the Arbitrator renders an award that the discharge was not for good and sufficient cause, The Post shall be obligated either (a) to restore the discharge employee to his position with full pay from the date of discharge to the date of reinstatement with service record unimpaired, or (b) at the option of The

Post to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI and a dismissal indemnity computed in accordance with the following schedule: . . . If the Arbitrator renders an award holding only that the discharge was not for willful neglect of duty or gross misconduct, The Post shall be obligated to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI. (Joint Exhibit 1, 16-17)

Article XVII, entitled "Grievance Procedure," provides, in Paragraph (2) thereof, that "In a dispute arising from a discharge of an employee, the Authority of the Arbitrator shall be that specified in Article VI of this Agreement." (Ibid., at 34)

Mrs. McLendon began to work for The Post in 1954, becoming a full-time employee in 1957; her primary work was in the women's department, doing a broad range of reporting:

Just practically anything you do in the Women's section. I covered the White House a lot, the First Family. During the last campaign I rode the Goldwater plane and covered it the last week for both the National desk and the Women's department.

I have covered fashion, food, features, hot news—I mean just anything that happens. (Tr. 434)

During the summer of 1967, in addition to general reporting, Mrs. McLendon was the regular Saturday editor of the Women's section. (Tr. 434-5) On Monday or Tuesday, August 28 or 29, she got an assignment to do a story on Prospect House, an historic house in Wash-

ington, for publication Sunday, September 10. According to Mrs. McLendon:

. . . Marie Sauer came to me, and she said, I know you are terribly busy, and I know you are leaving town, but we have to have this story on Prospect House, and it's scheduled as a color story. It would have been a week from that Sunday, and the reporter it had been assigned to—who I found out later was Dorothy McArdle; I don't know if Marie Sauer had told me that or not, but anyhow another reporter had been assigned to it, but she couldn't do it.

I explained to Marie Sauer that I had eight interviews in my notebook, that Mrs. Dudman before she left on vacation had assigned me to do an in-depth story about hair damage, and I had been working on this off and on for it must have been almost a month, and I could never get them to free me from regular daily assignments to sit down and do this. I had interviews in my notebooks that I hadn't even looked at for weeks.

I also had one interview on tape—because during that week I had injured a finger and couldn't write—which I hadn't taken off tape, and I explained to her this was such a big story I just didn't really have time to do a big story on Prospect House, you know, a color story.

She said, I know this, and I realize it, but we don't have anybody else to send, and you will just have to do it, and do it the best you can within the time that you have. (Tr. 439-40)

Mrs. McLendon testified that she called Mrs. Chatham, the owner of Prospect House for an appointment, and arranged for an interview for Thursday morning, August 31, the only time Mrs. Chatham was available. This

necessitated shifting Mrs. McLendon's day off; Miss Sauer, the Women's Editor, told her to take Wednesday off, and rejected Mrs. McLendon's request to work Wednesday as a sixth day:

I offered to work a sixth day because it would be easier for me to work six days and not rush, but she said I couldn't do it because of her budget problems. (Tr., 441)

Miss Sauer informed Mrs. McLendon that the story on Prospect House was to be a color story, on the first page of the Women's section:

I knew she wanted a big story because she said she wanted a good story on it, she wanted—since the house is going to be sold, and the price was \$2 million—a lot of information on what people were getting for their \$2 million. In other words, what kind of furnishings are you getting, what kind of history do you get? I mean, do you get social prestige? Everything you are getting, material—a complete story. (Tr., 443)

Mrs. McLendon testified that her interview with Mrs. Chatham "was a very, very disorganized type of interview" (Tr., 447), that, in order to pin down information as to which Mrs. Chatham was uncertain, Mrs. McLendon induced her to produce the furnishings inventory from which Mrs. McLendon "copied things." (ibid.) Mrs. McLendon further testified that she and Mrs. Chatham had considerable discussion about the Forrestals who had formerly owned the house and of the persons (the Shah of Iran and the President of France) who were guests at the house during the period of its lease by the Department of State. (Tr., 448) According to Mrs. McLendon, Mrs. Chatham was vague on details on the early occupants of the house. Asked whether she had anything in writing,

Mrs. Chatham offered books and a scrapbook. Mrs. McLendon testified:

I said, I don't have time to do my own research. I just have a short time to come out here with you. Haven't you a hand-out or fact sheet? Because I know that so many people do with big homes, like Mrs. Merriweather [sic] Post has a fantastic fact sheet, everything about her house, and history of it, little anecdotes, and all that. And I have been to other homes that have them.

So I asked her if she had anything like that. Again she said, Well, yes, but I don't want—well, I will let you see it, but don't mention this. Just like she said about this inventory, you know, Don't mention it. I said, All right, I won't. She said, I will let you see it if you won't mention it, so she gave me this.

I looked at it, and I thought it was just an ordinary hand-out, like I had received many many times. It was all typewritten, and I said to her, Now, is this new material? Is this all old? You know, I hadn't looked to see if it was historic.

She said, All of this has been used many times. This is just all pulled together. Feel free to use it, but just don't refer to it.

Q. Is this what—

A. This is what turned out as the Blue report.

Q. You say it was typewritten?

A. Yes.

Q. Was there any cover on it?

A. No. No cover.

Q. Did you examine it at that time, or what did you do with it?

A. Well, she said, This is the only copy I have. She said, I can't let you have it. You will have to take notes from it. So I started flipping through, taking notes.

With the photographers, and taking notes, and all that, you could see it was impossible to do that right there, so I said, May I just take it back to the office and type my notes from it? At first she wasn't going to let me have it. Finally she said, If you have it back here within an hour—two hours, something like that—so I dashed back and typed just here and there, you know, things out of the report.

Q. What did you think when Mrs. Chatham gave you this report? By the way, did she mention Mrs. Blue's name in any fashion?

A. No.

Q. Did she mention anything about the Fine Arts Commission when she gave it to you?

A. Oh, no.

Q. She just gave it to you and said here—

A. Yes. I thought it was something she had had prepared. For instance, I have mentioned Mrs. Post before. Mrs. Post has this complete thing on her house, and it was prepared by a woman I know named Mrs. Nettie Majors.

Mrs. Post hands this out to everyone who is doing a story, and there is never any mention of Mrs. Majors; this is something Mrs. Post paid for, and that is the way with other houses. As a matter of fact, I can remember years ago doing a story and a woman said to me, Don't mention her name; I paid her for this. This is mine.

So I just thought this was the same idea—the whole thing.

Q. What did you think when Mrs. Chatham said, Don't mention it, don't refer to it?

A. I thought it was in the category of this other thing she had had prepared, and that she just didn't want people knowing she had gone to the expense to have her house written up, the whole thing on her house.

Q. Was Mrs. Chatham very openly trying to sell the house at that time?

A. Yes. Oh, yes, there had been—well, I know there had been a story in the New York Times. [This presumably refers to Myra McPherson's story, referring specifically to "the most recent record, prepared for the Fine Arts Commission, Georgetown and Washington's architectural review agency," published in The New York Times on August 4, 1967, a clipping of which was available to Mrs. McLendon.] I think there had been something in something else about she had set her price at two million.

Q. Did you continue the interview, or when she gave you this material, was that the end of the interview?

A. No. We walked up and down with the photographers, and I had this thing in my hand. I don't know if I looked at it again or if I didn't. Many things in it she told me, but she didn't tell me in detail.

Q. Did you read through the entire report at that time?

A. Oh, no. I didn't have time.

Q. How much of it did you read at that time?

A. I probably just started glancing, and saw it was going to be, you know, impossible to take notes on this.

Q. What did you do after you finished the interview?

A. Then I came back to the Paper, and I took notes out of there, typed this, put it in an envelope, called her to say I was sending it out by cab. (Tr., 449-452)

Mrs. McLendon testified that she could not start writing the Prospect House story on Thursday because of another assignment (Tr., 453). On Friday:

... I did a rough lead, you know, the idea for your \$2 million you are getting more than a house, you

know, took it on down past probably about Mary Morris, and you know what people said about her and the ghost, so it would probably take maybe two or three pages, because you start very low on a page." (Tr., 456)

This material was shown on Friday to Louise Oettinger, the editor (Tr., 457). On Saturday, she was relieved at her editorial work at 10:00 a.m. or a little after to work on the Prospect House story. However, Mrs. McLendon added that, because of other tasks, she was not able to get to writing the story until "at least noon, or maybe a little after" (Tr., 462) and estimated that "at the very most" she had three hours to do the story" (Tr., 463):

Q. Was that customary for a story of this length?

A. Oh, no. No, if you have anything like that, you are allowed time to do your research, to begin with, to do your own research on a story like this, and then you would be allowed a full day, maybe two days, depending on the length of the story." (Tr., 463)

Mrs. McLendon testified on direct as to the writing of the story:

Q. In regard to writing the story itself, you described it as a hack job.

A. That is because you had to do it in such a hurry, without doing your own research.

Q. When you wrote the story itself I take it you testify that you wrote it from the interviews, from the Blue material?

A. Clips.

Q. From the clips, and from what you knew yourself?

A. Yes.

Q. In writing the story itself, did you take any of the material from the Blue material verbatim?

A. Well, I took and put in quotes these various historical things that were there, and I picked out a sentence here or a sentence there but—you know, I wrote it in such a hurry, and I thought this is a hand-out, and I used it, and I really didn't know how much I used, but this historic stuff, I put all in quotes, these various people. I said, according to legend, something happened. I said, something in a newspaper this happened—that type of thing.

Q. Did you see Mrs. Blue's name on the report at all?

A. Yes.

Q. What did you think of it when you saw it?

A. I thought it was somebody Mrs. Chatham paid to do this for her.

Q. Had you ever—

A. I had never heard of Mrs. Blue.

Q. Did you indicate anywhere on the story your source material for all the things you wrote about in the story?

A. No, I don't put sources on.

Q. You don't put sources on?

A. No.

Q. Why?

A. I just never got in the habit. . . .

Q. What would be the customary practice in terms of indicating on top of the story where the material came from when you used a press release?

A. I never put it on.

Q. Would you ever attach the press release to a story?

A. No, not unless I was covering something that someone else was going to cover. . . .

Q. You are saying over the years in The Washington Post you would not indicate at the top of the story where the source was, or you would not attach the release to the story?

A. No. I can't even remember doing it, and if I did it may have been because an editor might have said on a particular thing, Put your source, that would be the only reason I would ever do it. Otherwise I don't. (Tr. 464-68)

Saturday, September 2, was Mrs. McLendon's last day of work prior to her leaving for her vacation the following Monday. Her story on Prospect House was edited by Louise Oettinger and was published on Sunday, September 10. Under date of October 10, 1967, Mrs. William L. Blue wrote the editor of The Washington Post as follows:

I was fascinated to read Winzola McLendon's recent account (Sunday, September 10, 1967) of Prospect House, and I think it may be of interest to your newspaper to know that almost all of the historical material so liberally quoted by Mrs. McLendon was taken from an historical survey of Prospect House prepared for the Fine Arts Commission. Of course Mrs. McLendon failed to credit the latter organization in any way, nor did she ask permission to use any part of this study from a member of the Fine Arts Commission . . . or from me, the volunteer historical researcher who prepared the survey.

I realize that Mrs. McLendon obtained a copy of our survey from the present owner of Prospect House, Mrs. Turner Bailey (the former Mrs. Thurmond Chatham) who probably encouraged Mrs. McLendon to use its contents as if they were her own. Although the research studies compiled by the Fine Arts Commission are not protected by copyright laws, I can't help but raise a vigorous protest in view of the cavalier methods by which Mrs. McLendon "gathered" her historical facts from the work of others, all of which seems so cheap and unbecoming the stature of the Washington Post. (Publisher's Exhibit 5)

The letter was referred to Mrs. Dudman, Executive Editor of the Women's Department who spoke to Mrs. McLendon about it. Subsequently, there was a meeting of Mrs. Dudman, Mrs. McLendon, Mrs. Blue, and Miss Nancee Black of the Fine Arts Commission. Mrs. Dudman reported the matter to Benjamin Bradlee, the Managing Editor. Discussions were had by Mr. Bradlee with J. Russell Wiggins, Editor of The Post and other executive personnel; Mr. Bradlee made a comparison of the Blue manuscript with the story as published in The Post, and, at discussion with Mrs. McLendon informed her that she was dismissed. Under date of October 26, Mr. Bradley wrote to Mrs. McLendon, saying: "... this is to advise you that you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism." (Publisher's Exhibit 7) Following the failure of the Guild and the Publisher to resolve the dispute over the dismissal of Mrs. McLendon, the matter proceeded to arbitration under the auspices of the American Arbitration Association.

In urging that the dismissal of Mrs. McLendon for gross misconduct be sustained, the Publisher describes the issue as basically one of plagiarism—"the fraudulent copying of a material and substantial portion of the literary product of another." (Publisher's Brief, 9) This, it is said, is especially serious in the case of a professional reporter. "It is the status of Mrs. McLendon as a fully experienced, seasoned reporter that makes her fraudulent use gross misconduct." (Ibid., 17-18) Plagiarism is said to perpetrate a fraud against authors, publishers, and readers or any of them.

The Publisher claims that Mrs. McLendon knew that the Blue report was prepared for the Fine Arts Commission and that, notwithstanding this, she made no effort to secure permission from Mrs. Blue or from the Commission to use

the report. Nor did she ascertain from Mrs. Chatham the reasons for the latter's insistence that no reference be made to the report in Mrs. McLendon's story.

Further, we are told "The Washington Post does not consider fraudulent use of a substantial and material part of another's literary product as proper or tolerable conduct" (Ibid., 13) and it does not, and has not, condoned violation of this standard by its employees: "To avoid fraud, disclosure or attribution can take many different forms. It would not, for example, be necessary to cite each item of information or paraphrase of language from a document. Especially is this true where press release or similar documents distributed widely for specific reuse by the press or others are involved. While at times difficult, fraud and poor journalistic practice must be differentiated. An application of reasonable judgment readily permits such distinctions to be made." (Ibid., 15) Mrs. McLendon should have, but did not, disclose the source of her material. She took substantial portions from the Blue manuscript, and her taking is especially significant since it concentrated on the historical parts of the subject. No distinction should be made, according to the Publisher, between verbatim lifting of material, the quotation of material which is quoted in the Blue report, and the paraphrasing. The Publisher asserts that "even under the extreme position taken by the Guild, the actual 'copying' . . . still amounts to the substantial and material portion of approximately 10% of the wordage in Mrs. McLendon's article." (Ibid., 13)

What is described as her "*massive deceit*" is asserted to have destroyed Mrs. McLendon's "ability to continue as an employee of the company. An editor has the ultimate responsibility to insure that his reporters give the newspaper's readers accurate news and information. On a large newspaper this responsibility can be carried out, as a practical matter, only through justified trust and con-

fidence in the integrity of his staff. . . . The success of a major newspaper is dependent upon a number of factors, but integrity clearly stands at the top of such ingredients. Were the Washington Post to condone the kind of journalism inherent in Mrs. McLendon's conduct here, it would neither retain nor deserve the respect and confidence of its readers." (Ibid., 16-18)

As to the Guild's position, the Publisher urges, that Mrs. McLendon's story and the Blue manuscript must be viewed as wholes in relation to each other in order to determine the extent of the plagiarism. There is no justification for limiting the inquiry to varbatim appropriation of material alone; the quotation of quoted materials and the paraphrasing must likewise be considered. The Publisher takes issue with the Guild's view that Mrs. McLendon could rely upon the permission which she got from Mrs. Chatham to use the report as she saw fit. Further, the Publisher rejects the comparisons made by the Guild between the Blue report and press releases, fact sheets, brochures, and handouts; it adds that, in any event, the extent of the appropriation by Mrs. McLendon made for a major distinction. As to the many exhibits offered by the Guild in support of its claim of industry practice, the Publisher insists that there is no evidence that The Post had knowledge of indulgence in the claimed practice by its employees. Moreover, the Publisher asserts that there has never been any need for the promulgation of a policy in respect to matters of this kind. Finally, the Publisher rejects the claim that Mrs. McLendon was not allowed sufficient time to do the story properly.

The Guild's case rests principally upon its view that the Blue report was regarded by Mrs. McLendon as a "hand-out" to be used as such. When she received the report from Mrs. Chatham, she was not told that it had been prepared for the Fine Arts Commission and there was nothing on the document to indicate any connection with the Commission. It was not unreasonable for Mrs. McLendon

to believe that Mrs. Chatham was the owner of the report, since she was the owner of Prospect House. "Similarly, Mrs. McLendon had no reason to question the apparent authenticity of Mrs. Chatham's ownership of the report when Mrs. Chatham directed her not to mention the document in her article. Mrs. McLendon reasonably believed that Mrs. Chatham, for reasons of her own, did not wish to disclose that she had had the report prepared and Mrs. McLendon placed the report in the same category as the inventory which Mrs. Chatham earlier had cautioned her not to mention in the article." (Guild's Brief, 2) Nor was there any reason to identify the Blue report with the Fine Arts Commission report mentioned in the McPherson story in The New York Times. The Blue report, on its face, resembled a "hand-out" or a fact sheet. (Ibid., 2-3) Mrs. McLendon was not given enough time to do a proper story and regarded it as a "hack job."

The criteria testified to by the editors are vague and are not in fact the standards either in the industry or at The Post. The Guild claims that paraphrase of hand-out material and quoting of such material without attribution to the particular source in case of the latter and without any attribution in case of the former is permissible journalistic practice; further, that quoting quoted material with attribution to the original source (but not to the hand-out) is permissible, as is the kind of unattributed verbatim use of "factual or historical hand-out material" charged to Mrs. McLendon. Various witnesses, says the Guild, "agreed that with respect to hand-outs, paraphrase, quotation, quotes of quotes, and verbatim usage, *all without attribution to the hand-out*, are normal journalistic practices particularly where the reporter is being 'pushed' and the material is historic or factual or 'where you are recounting more the lore and the legend.'" (Ibid., 9) Such testimony, according to the Guild, is buttressed by the numerous examples in the exhibits, relating to The Post and other publications, of usage which diverges widely from that asserted by the Publisher to be its standard. Further,

the Guild emphasizes that the Publisher has never promulgated any standards and that Mrs. McLendon cannot be held accountable for not observing standards which have not been formulated and announced.

Finally, the Guild argues that, in view of Mrs. McLendon's prior record and her length of service with The Post, discharge was too great a penalty to constitute "good and sufficient cause," even assuming that she had "violated good practice in her treatment of the Blue report in writing the Prospect House story" (Ibid., 15)

We turn now to the material itself. Various segments are given in three versions: (1) as they appeared in the Blue report; (2) as written by Mrs. McLendon—her "hard copy"; and (3) as edited and published.

Close comparison of the Blue manuscript with the published story and with Mrs. McLendon's "hard copy" warrants the conclusion that the grievant's appropriation of material from the manuscript was not confined to an occasional word, phrase, or even sentence. Instead, solid chunks of the manuscript were taken with little or no change and used by the grievant in her story.

At page 7, speaking of General Lingan, the manuscript says:

In 1776 he was commissioned as a lieutenant in the Continental army. He was wounded by a Hessian bayonet in the Battle of Long Island, captured by the British at Fort Washington on November 16, 1776, and taken aboard the Jersey, an infamous prison ship, commonly called the "Hell". As a result of the inhuman treatment aboard this ship, many of the prisoners died. A remarkable story is told of the then Lt. Lingan's amazing courage in the face of an appalling experience. "When the coffin was brought for the body of one of his friends, it was found to be too short—the guards started to decapitate the body to make it fit. Young Lingan stood over the body and

said he would kill them with his bare hands. So they brought a larger coffin."

While still a prisoner, Lingan received a visit from his cousin, Admiral Sir Samuel Hood, "of His 'Satanic' Majesty's Navy", as it was often called, who offered him two thousand pounds and high rank in the British Army if he would return to his former allegiance. Lingan answered: "I'll rot here first." He almost did. . . .

In Mrs. McLendon's "hard copy," we find:

... He served in the Continental army, was wounded by a Hessian bayonet in the Battle of Long Island, captured by the British at Fort Washington on Nov. 16, 1776, and taken aboard the Jersey, an infamous prison ship, commonly called the "Hell."

A remarkable story is told of the then Lt. Lingan's amazing courage in the face of an appalling experience aboard the Jersey. "When the coffin was brought for the body of one of his friends, it was found to be too short—the guards started to decapitate the body to make it fit. Young Lingan stood over the body and said he would kill them with his bare hands. So they brought a larger coffin."

While still a prisoner, Lingan was offered by his cousin Admiral Sir Samuel Hood two thousand pounds and high rank in the British Army if he would return to his former allegiance. Lingan answered, "I'll rot here first." He almost did.

As edited, this material was published; there were some changes in words and phrases and punctuation, increasing somewhat the variations from the Blue manuscript:

... He served in the Continental army, was wounded by a Hessian bayonet in the Battle of Long Island,

captured by the British at Fort Washington on Nov. 16, 1776, and taken aboard the Jersey, an infamous prison ship commonly called "The Hell."

A story is told of then Lt. Lingan's courage while he was aboard the Jersey. When a coffin was brought for the body of one of his friends, it was found to be too short and the guards started to decapitate the body to make it fit. Young Lingan stood over the body and said he would kill them with his bare hands. So they brought a larger coffin.

While still a prisoner, Lingan was offered by his cousin, Adm. Sir Samuel Hood, two thousand pounds and high rank in the British Army if he would return to his former allegiance. Lingan answered, "I'll rot here first."

On the subject of Mary Morris, the manuscript says (at pages 13 and 14):

. . . Mary Chase Steele, married George Upham Morris, another noted naval officer, who, when only a lieutenant, was left in charge of the ill-fated Cumberland during its bloody battle with the Confederate iron-clad Merrimac . . .

After her husband's death, Mary Steele Morris continued to live on at Prospect House . . . Mrs. Morris was well-known in the neighborhood as an "ardent spiritualist" and legend has it that "she invoked the shades of many departed relatives and friends during her life-time."²⁵ . . .

Fortunately, the house was still standing when Mrs. Morris died in 1930. She had willed her share of the property to the First Spiritualist Church of Washington, D.C. However, through Mrs. Morris' nephew, Capt. Edward B. McCauley (the son of Frances Steele

McCauley), Prospect House was soon restored to the Steele-Morris family.

Captain McCauley and his wife gained full ownership in 1934

Capt. McCauley . . . and his wife "entertained often and brilliantly at Prospect House". They are reported to have regaled their guests "with the latest stories of the ghost who walked in their house. 'The ghost, if there is one, is my aunt,' Capt. McCauley once observed. 'This was her home for many years. She has my permission to make a return visit any time she pleases.' " 28

In the "hard copy," this material appears as follows:

She [Mary Morris] was the wife of Commodore George Upham Morris who as a Navy lieutenant was left in charge of the ill-fated Cumberland during its bloody battle with the Confederate iron-clad Merrimac.

After her husband's death, Mary Morris continued to live on in Prospect House and became well-known in the neighborhood as an "ardent spiritualist and legend has it that she invoked the shades of many departed relatives and friends during her lifetime."

When she died, Mary Morris willed Prospect House to the First Spiritualist Church. However, her nephew, Captain Edward B. Canley was able to get the house back in the family.

During the 1930s, Capt. and Mrs. McCauley used to regale their guests with the latest stories of the ghost who walked in their house.

"The ghost, if their is one, is my aunt," Capt. McCauley once observed. "This was her home for many years. She has my permission to make a return visit any time she pleases."

The edited and published version reads as follows:

... She [Mary Morris] was the wife of Commodore George Upham Morris, who as a Navy Lieutenant was in charge of the ill-fated Cumberland during its bloody battle with the Confederate iron-clad Merrimac.

After her husband's death, Mary Morris continued to live in Prospect House and became well known in the neighborhood as an ardent spiritualist. Legend has it that she invoked the shades of many departed relatives and friends while she was living there.

When she died, Prospect House went to the First Spiritualist Church under the terms of her will. However, her nephew, Capt. Edward B. McCauley, was able to get the house back in the family. During the 1930s, Captain and Mrs. McCauley often regaled their guests with stories of a ghost who walked in their house.

"The ghost, if there is one, is my aunt," Captain McCauley once declared. "This was her home for many years. She has my permission to make a return visit any time she pleases."

It will be noted that, as in the case of the Langan material, the editorial changes add somewhat to the variations from the manuscript version: e.g., the substitution of "declared" for "observed" and the deletion of quotation marks in the second paragraph.

Treating of the more recent history of Prospect House, the Blue manuscript says (at pages 14 and 15):

In 1942 the McCauleys moved from Washington and sold the house to Sydney A. Mitchell, a millionaire New York investment banker, one of many "dollar-a-year" men who came to serve with the Federal government during World War II.²⁹

In 1945 Mr. Mitchell returned to New York and the house was purchased by Mrs. Josephine Ogden For-

restal, wife of the Hon. James E. Forrestal, then Secretary of the Navy and later the first Secretary of Defense. After his tragic death on May 12, 1949, the house was leased from Mrs. Forrestal by the U.S. Government for the use of the Department of State as a "guest house" for foreign dignitaries while President and Mrs. Truman occupied Blair House.

From 1949 to 1951 this great house once again welcomed distinguished and eminent men, among them the Shah of Iran (November, 1949), the President of France, M. Vincent Auriol, and several Presidents of South American countries.³⁰ And according to a most unflattering newspaper account, dated June 11, 1950, the *Washington Times-Herald*, an incessant foe of the Department of State and its Secretary, Dean Acheson, accused the State Department of staging "propaganda parties" at Prospect House "at the taxpayers expense" "to 'soften up' Congress." "For many weeks," the reporter, Willard Edwards, stated, "Secretary Acheson and a corps of assistant secretaries have been . . . inviting groups of senators and representatives to drink and make merry in one of the capital's show places. The public pays the bill for these entertainments. . . . Despite the fact that scores of congressmen and their secretaries have attended the weekly parties, they remained a dark secret. The gatherings had a faint resemblance to stag entertainments 'for men only', featuring liquor and feminine companionship as well as honeyed words from back-slapping diplomats. . . ."

Mrs. McLendon, in her "hard copy," treats this material as follows:

They [the McCauleys] later sold it to Sydney A. Mitchell, a New York millionaire and one of many "dollar-a-year" men who came to serve with the government during World War II.

In 1949 Mitchell sold the house to Josephine Ogden Forrestal, wife of James E. Forrestal, then the Secretary of the Navy and later the first Secretary of Defense. After he committed suicide in 1949, the house was leased to the U.S. Government to be used as a guest house for foreign dignitaries while President and Mrs. Truman occupied Blair House.

The Shah of Iran was a guest there, as was the President of France, M. Vincent Auriol.

And there was an unflattering newspaper account accusing the State Department of staging "propaganda parties" at Prospect House "at the taxpayers expense" . . . "to soften up Congress."

The newspaper said that groups of senators and representatives had been invited to Prospect House "to drink and make merry in one of the capital's show places. The public pays the bill for these entertainments. . . . The gatherings had a faint resemblance to stag entertainments 'for men only' featuring liquor and feminine companionship as well as honeyed words from back-slapping diplomats."

The published version, incorporating various editorial changes, reads as follows:

They [the McCauleys] sold it to Sydney A. Mitchell, a New York millionaire and one of many "dollar-a-year" men who served the Government during World War II.

In 1949 Mitchell sold the house to Josephine Ogden Forrestal, wife of James E. Forrestal, then Secretary of the Navy and later the first Secretary of Defense. After he committed suicide in 1949, the house was leased by the Government to be used as a guest house for President and Mrs. Truman, who were living in

Blair House during the reconstruction of the White House.

The Shah of Iran was a guest there, as was the President of France, Mr. Vincent Auriol.

A newspaper article appeared during that time accusing the State Department of staging "propaganda parties" at Prospect House "at the taxpayers' expense . . . to soften up Congress."

The newspaper said that groups of Senators and Representatives had been invited to Prospect House "to drink and make merry in one of the Capital's show places. The public pays the bill for these entertainments . . . The gatherings had a faint resemblance to stag entertainments 'for men only' featuring liquor and feminine companionship as well as honeyed words from back-slapping diplomats."

There are two curious departures from the manuscript in the published account. The published story (and the "hard copy") indicate that the sale by Mitchell to Forrestal occurred in 1949, whereas the manuscript strongly implies that the sale occurred in 1945. Further, the published account says that Prospect House was leased as a guest house for President and Mrs. Truman, though the manuscript (and the "hard copy") indicate that it was to be used as a guest house for "foreign dignitaries."

Mention should also be made of several much-smaller portions of the Blue manuscript which appear in substantially unaltered form in Mrs. McLendon's "hard copy" and in the published story. Thus, the manuscript says (at page 11): "The second owner of Prospect House was perhaps not quite so colorful as General Lingan" and continues (at page 12): "Nevertheless, John Templeman's wife and descendants continued to own Prospect House until 1858 when it was sold for a little less than \$5,000 to

Thomas T. Mann, who is listed in the City Directory of that year as a medical doctor, living at 115 Prospect Street." The "hard copy" says: "The second owner of the house, John Templeman of Boston, was perhaps not quite so colorful as General Lingan. . . . John Templeman's wife and descendants owned Prospect House until 1858 when it was sold for a little less than \$5000 to Thomas T. Mann, a medical doctor." The edited version deleted "was perhaps not quite so colorful as General Lingan." And, the statement in the manuscript that Mr. and Mrs. Chatham "handsomely and carefully restored the house and grounds" appears in the "hard copy" as "They handsomely and carefully restored the house and grounds . . .," while the editor deleted the words "handsomely and."

The inclusion here of the foregoing comparisons is not intended for the purpose of establishing that Mrs. McLendon made use of the Blue manuscript, for the grievant and the Guild concede such use. While she did not, at the time of writing the story, disclose to the editor the circumstances and the conditions under which Mrs. Chatham made the manuscript available to her, it is clear that, prior to her discharge, she informed Mrs. Dudman that, along with the Post clippings, the New York Times story, and the insurance inventory, she had had a report given her by Mrs. Chatham with instructions not to reveal the source of the information. (Tr., 314)

What is significant about the comparisons—the reason for quoting the material at length—is the light which they shed on the character and extent of the use by Mrs. McLendon of the Blue report. Describing her activity, Mrs. McLendon said: "Well, I took and put in quotes these various historical things that were there, and I picked out a sentence here or a sentence there but—you know, I wrote it in such a hurry, and I thought this is a hand-out, and I used it, and I really didn't know how much I used, but this historic stuff, I put all in quotes, these various people.

I said, according to legend, something happened. I said, something in a newspaper, this happened—that type of thing.” (Tr., 465, see above page 7) In my opinion, this falls far short of representing fairly the actual situation.

Except for the deletion of one sentence and part of another, Mrs. McLendon’s “hard copy” on General Ligan is virtually 100 per cent identical in words, phrasing, and punctuation with parallel material in the Blue report. The first, second, fourth, and fifth paragraphs of the “hard copy” story on Mary Morris, except for some deletions and minor word changes, are identical with the Blue report. So, too, there is substantial identity between large portions of the “hard copy” story on the more recent history of Prospect House and the Blue report, especially as to the last two paragraphs of the “hard copy.” Clearly, the verbatim use of the Blue report is preponderant in all three of the lengthy passages. There is, to be sure, some paraphrasing, but this seems to be for the most part quite minor in character: e.g., the substitution of a pronoun for a proper name and the substitution of “newspaper” for “Washington Times-Herald.”

If there is an implication in Mrs. McLendon’s testimony quoted above that she added quotation marks to portions of the material, it is plain that such an implication would be wholly without foundation. For the fact is that Mrs. McLendon did not add any quotation marks whatever and such quotation marks as appear in her story appear also in the Blue report. If all of Mrs. Blue’s own words had been placed by Mrs. McLendon in “double quotes” and the material quoted by Mrs. Blue in single or “inner quotes” there would have been no difficulty in sorting out the several authors and in separating Mrs. McLendon’s own words from those of Mrs. Blue and from those of the sources quoted by the latter. As the work was done, however, there was a total failure to attribute to the Blue report anything which was taken from it, nor, by the use of appro-

priate quotation marks to indicate that much of the language was not Mrs. McLendon's own. It seems to me, further, that in her use of material which appears in the Blue report with quotation marks, Mrs. McLendon, in failing to make attribution to the Blue report appropriated the results of Mrs. Blue's work in substantially the same degree as in appropriating Mrs. Blue's own words, for the gathering of quotations which are not generally familiar may be a no less creative effort than other kinds of research.

As stated above, the Guild's position is mainly that Mrs. McLendon reasonably believed that the Blue report given her by Mrs. Chatham was a hand-out in the journalistic sense and that the use made of it, both verbatim and paraphrase, was not improper under what are claimed to be practices of the industry. The witnesses presented by the Union testified as to these practices, but not as to the specific facts involved in the McLendon case; thus, they did not give testimony as to whether the Blue report could properly be regarded as a hand-out, or as to the use made of it by Mrs. McLendon, or whether such use was proper.

Frances L. Lewine testified that it is generally understood that press releases or brochures relating to historical places are "available for use by reporters as they see fit" (Tr., 400), that it is common practice to paraphrase such documents, and that paraphrased material is not often attributed to its source "unless there is some question on the reporter's part as to whether the material provided is factual, or maybe if there is any doubt about the material" (Ibid.) As to verbatim use, the witness stated: "It might be done. Yes, I think some reporters will do this" (Tr., 402) but found it very difficult to say under what circumstances this would be done and she could not provide a specific instance. The use of verbatim material is a matter of judgment "depending on [the reporter's] needs at the time and depending upon the circumstances

under which he gets the material, and how he finds it" (Ibid.) As to attribution, Miss Lewine testified that there might or might not be; presumably, there need not be in the case of technical material such as the length of the flight deck of an aircraft carrier or "scientific material, perhaps the description, for example, of antique furnishings or such things, areas where the reporter could not necessarily of his own knowledge know the specifics of a certain area, and would have to depend upon expert knowledge that is presented to him to report accurately on something that he is observing." (Tr., 403-04) Parenthetically, it may be noted that it is not clear from the record whether the witness really addressed herself at this point to the need for attribution or only to the verbatim use of material with attribution. The witness added that there were no norms or averages relating to the amount of material which could be properly paraphrased or used verbatim. (Tr., 405-06) On cross-examination, Miss Lewine said she could not recall any press releases which had two pages of footnotes (Tr., 411) and that it was not common to "find the preparer's name attached at the bottom of a press release or fact sheet or brochure that is given to the press (Tr., 413), though on redirect she stated that it often happens that the name of the person preparing the release and his telephone number will be on the release. (Tr., 415) Miss Lewine did not testify as to the propriety of using material verbatim without quotation marks.

Isabel Shelton testified that she would take technical material (e.g., architectural terms) verbatim, especially from a public document like a Park Service pamphlet, without citing the source, but "I think you would be more likely to cite the source if you had some doubt of the source. (Tr., 483-4):

Q. When you are talking about public, would you put the press release from a commercial source in the same category that you would the Park Service pamphlet?

A. Yes, but I might be a little more suspicious of a commercial source, if it's somebody selling a product or something.

Q. What would you mean in terms of you would be more suspicious?

A. I would have to be awfully sure that he wasn't trying to somehow get me to give him publicity on a commercial product, is what I am saying.

Q. In other words, that he would have a point of view that he is trying to get you to buy?

A. Yes. I assume the Park Service in giving historical material is just giving historical material. I think any reporter who then has any doubt about something, that is when you hang it on them for sure. (Tr., 484-85)

As to the verbatim use of material, Mrs. Shelton said:

.... Again, you don't use very much material verbatim, but the reason you don't use it verbatim in my judgment isn't that you are under any compunction in the sense that the guy who gave you the material wouldn't want you to use it. . . . you don't do it for reasons of your own, of your judgment, that it isn't worth this much, and it isn't very well written—basically you are not thinking about him; you are thinking about the paper and what the paper wants, what the legitimate public information. . . .

In terms of the newspaper you probably would for various reasons rewrite it. You are conscious the same material is going to other papers, and you don't want it to look as if you just marked up something and threw it in the paper. . . . Your whole focus is not what did this man say but what do we want out of it for our paper? (Tr., 488-89)

Some releases are difficult to rewrite because they are well done and relate to such matters as the time and place

of a meeting. However, Mrs. Shelton added: "There aren't any positives in this" (Tr., 490) and, as to such matters as attribution of uncopyrighted material, her testimony is perhaps best characterized by her statement: "... really it is awfully hard for me to make these judgments in a vacuum." (Tr., 494) She did not testify as to the propriety of quoting material without the use of quotation marks.

In sum, the Guild's witnesses testified that press releases and such are made available to reporters for whatever use the reporters wish to make of them, that the material contained in them may be paraphrased or quoted, that attribution may not be made in the case of technical or factual specifics. They were quite indefinite as to the need for attribution on other matter, and they did not testify as to the quantity of material which might properly be quoted or the need to identify quoted matter specifically. And, as noted above, they did not address themselves to the facts of the particular case.

James Reston testified on behalf of the Publisher. Since his testimony dealt with the specifics of this case as well as with the more general matters covered by the Guild's witnesses, it will be given here in the form of consecutive excerpts from the manuscript:

Q. . . . Would you please tell us what is your opinion of the usage of the Blue report by Mrs. McLendon in the manner in which it was used.

A. Well, where she paraphrases, I don't see anything wrong with that at all. We do that all the time. We do that with hand-outs all the time.

But where there is a direct use of material from a hand-out, or whatever it was, without identification as to where it came from, that seems to me to be wrong.

Q. Would you consider that a form of serious misconduct on the part of a professional writer?

A. We would have an awful lot of trouble with that in our shop.

Q. Would you consider it in terms of journalism as journalistic plagiarism?

A. Yes, I would.

Q. . . . Would this qualify as a hand-out?

A. I would assume that was a hand-out from just reading it, yes.

Q. . . . on the assumption that this was a hand-out available to all reporters, would you consider the use in copying the material wholly apart from the use of the material as a source of information for the preparation of an article, as journalistic plagiarism?

A. Well, I don't know what journalistic plagiarism is in that term. I have never heard a term like that before. But I do know this is a hand-out town, and if anybody on our staff took a hand-out—and we get them by the hundred every day—and just copied from that hand-out, we would be in trouble, and whoever did it would be in trouble. (Tr., 360-62)

On cross-examination:

Q. Mr. Reston, if you paraphrase a hand-out, would it be acceptable?

A. [Yes.]

Q. So that what you would object to as a journalist is the verbatim use of a hand-out or hand-out material?

A. Yes.

Q. Does the quantity of verbatim use within a particular article affect your judgment as to whether the reporter was acting properly or improperly?

A. Quantity would have something to do with it. I think there are two things here. At the time for example, John Gardner resigned, we were given a biographical sketch of John Gardner's life from HEW. Certainly the material in that hand-out can be used. That was its intent. There would be no problem if the fellow doing the man in the news, for example, on John Gardner, were to take the facts out of that thing, put it into his own words.

If he merely took a hand-out, and just put it all in the third person, or substantial portion of it in the third person, I think we would be very embarrassed And if we [he?] just took it without identifying where it came from, and used it, I think similarly we would be justified in being criticized. . . .

Q. . . . Would the fact that in the course of say a 1500-word story [a reporter] used five to ten sentences verbatim disturb you greatly?

A. . . . I couldn't characterize five or ten sentences in 1500 words. It shouldn't be done, I wouldn't say. If it were done five, seven sentences, or something like that, or even ten, I would [not?] think this was the ultimate crime, but it is damn bad practice.

Q. Sloppy journalism?

A. Yes, it is indeed.

Q. If we add to that equation—we are maintaining the same hypothetical—if the reporter were under a particularly strong deadline and was rushed with other work, would that change your impression of it in any way? Would it make it still sloppy but more excusable or less excusable, or what?

A. Well, a reporter who does that, you know, still lays the paper open to the next day when the paper comes out, there will be people who know about this story, say, What is going to be done? They are not going to make a lot of judgments about whether you were close to deadline or what. They are just going to say, what kind of paper is this. . . .

Q. [by the Arbitrator] . . . Assuming that on the one hand one were to copy from a story in the New York Times, and on the other from a book in the New York Public Library. Would you treat these as being equally offensive . . . ?

A. Well, it could be equally offensive. . . . if a reporter just went in to the morgue and took anything out, you know, you could earn your living doing that, and it would be a very bad practice.

Whether it would be what you call plagiarism, I don't know. . . . I think of plagiarism as being something in which a writer takes the words of another writer of any kind, whether in the files or in a book or in a hand-out, and gives the reader the false impression that this was his construction of the sentence, this was his construction of the story, when it wasn't.

I don't know what legal plagiarism is, but this is just in my mind a simple case of whether you are leveling with the reader or not leveling with the reader, and giving the reader the impression these are your words when they are someone else's. . . .

Q. And the sin . . . is the verbatim use of a press release at all, isn't it, when you take a release, you mark it up, and you send it up to your editor, and say, Look what a great guy I am.

A. No, you cheat. You cheat because you give the reader the impression that you wrote something you didn't write. That is the central point. . . .

Q. And in your direct testimony, I take it, you have made a distinction, whether it be a significant distinction, between the verbatim use of a press release—that kind of cheating where you mark up the entire press release or a big glob of the press release, and that is nine-tenths of your story—and the judicious or injudicious use under pressure of deadline or a sentence here, a paragraph there, in the course of a long story.

A. Not a paragraph here. I give you it was built in 1868, or whatever it is. A simple fact like that. There may be a repetition of the same simple construction of a sentence. I don't see that there is anything particularly wrong with that.

When you start taking paragraphs, and just throwing it into the story, I think you are in trouble.

Q. You are just being a little sloppy?

A. You are being worse than sloppy by our standards. (Tr., 362-73)

Asked, on re-direct, as to whether he regarded Mrs. McLendon's article as plagiarism, the witness responded:

If you keep it to lifting of material from a hand-out, it seems to me it was a helluva of a lot lifted out of this hand-out and put in this article. If you ask me about plagiarism, I don't know exactly what your legal definition of plagiarism is, so I don't want to respond to that because I don't know. (Tr., 374)

On re-cross:

Q. From a journalistic point of view.

A. From a journalistic point of view, we couldn't tolerate this kind of thing. This is a hand-out town. If we had this kind of practice in the Times Bureau, we would have great trouble with the entire staff, if we tolerated that kind of thing.

Q. Do you make any distinctions in your own mind between the paraphrase and the verbatim? You obviously have.

A. Yes, I do make a distinction, but, again, I think there is a distinction—there is a distinction within the distinction, if I can be ambiguous in this sense.

You are still in trouble if you take the hand-out and merely paraphrase it, because anybody can do that, change it from the first to the third person. It is still sloppy practice in my opinion.

Q. [Does the failure of an editor to stop a practice of occasional use of verbatim material from hand-outs place the reporter in jeopardy?]

A. Oh, that—you are getting into fuzzy things here. Let's don't kid ourselves about this. Any good reporter knows you don't pick up whole paragraphs out of hand-outs and paraphrase it or— . . . (Tr., 374-77)

The testimony of other witnesses for the Publisher may perhaps be epitomized by the following excerpt from the testimony of Marquis W. Childs:

Q. I should like to ask you whether your examination has led you to the conclusion that in the preparation

of this article Mrs. McLendon has used extensively the words and the information and material contained in the Blue report.

A. It seemed to me so, if you compare one with the other, and there are large passages which are taken directly out of the Blue report.

Q. In view of the magnitude of the usage and character of the usage, would it be your opinion that Mrs. McLendon committed plagiarism in her use of the Blue report?

A. Yes, by any definition of plagiarism, it seems to me that it was plagiarism. (Tr., 380)

* *

On the basis of the record as a whole, I am of the opinion that Mrs. McLendon acted very improperly in the character and extent of her utilization of the Blue report, in her failure to make attribution in the article itself, in her failure to secure permission to use the report from the persons authorized to grant such permission, and in her failure to inform her editors of the circumstances under which she secured the report as well as the conditions attached by Mrs. Chatham to its use.

Not the least of Mrs. McLendon's errors was her failure to ascertain that the Blue report was in fact what she believed it to be: namely, a hand-out. I assume that hand-outs are made freely available to reporters; this, indeed, seems to be their only reason for being. Mrs. McLendon should have been alerted to the possibility that the report was not a hand-out by Mrs. Chatham's curious failure to make any reference to it whatever until Mrs. McLendon persisted in asking whether she had a fact sheet or a hand-out. There was no necessary parallel between the inventory which Mrs. Chatham was reluctant to disclose and the Blue report; it is one thing to withhold a document containing a detailed schedule of prices of household furnishings and quite another to withhold a document of primarily historical value. Mrs. McLendon should have been alerted by

Mrs. Chatham's unwillingness to have the Blue report leave her premises at all, at her subsequent insistence that it be returned in an hour or two, and most of all, at her insistence that no reference be made in the story to the report. It seems to me far-fetched to suppose that reference in a newspaper story to something like "a recent report on Prospect House" would be interpreted by readers to mean that Mrs. Chatham had paid to have a report made or that, if it would be so interpreted, it would matter to Mrs. Chatham. Mrs. McLendon should certainly have been put on notice by the fact that Mrs. Blue's name was appended to the report, that many footnote superscripts appeared in the manuscript, and that two pages of footnote references were part of the report.

I cannot understand why Mrs. McLendon did not ask any questions whatever on the foregoing matters of Mrs. Chatham. There is no apparent reason for not inquiring who Mrs. Blue was, when the manuscript or report was prepared, whether it would be published, etc. Further, since Mrs. McLendon had had the McPherson story in *The New York Times* and had presumably noted the reference to the Fine Arts Commission, I find it difficult to understand why Mrs. McLendon did not ask Mrs. Chatham if she had, among all the books and scrapbooks on Prospect House, a copy of the Fine Arts Commission report. There were, in short, many elements in the situation which should have put Mrs. McLendon on her guard. She did not apparently give consideration to any of these; her omission cannot now be made the basis for a conclusion that she could reasonably have regarded the report as a hand-out owned by Mrs. Chatham and which Mrs. Chatham could rightfully make available to reporters to be used as they saw fit subject to the condition that no reference to the document be made in their stories. Nor can I understand why Mrs. McLendon did not inform her editors of Mrs. Chatham's insistence upon non-reference. Assuming that Mrs. McLendon thought Mrs. Chatham had her private

reasons for this, surely the situation must have impressed Mrs. McLendon as very strange; after all, as Mrs. Shelton testified: "Any press agent's idea of heaven is to get his whole press release in the paper exactly the way he gave it to you." (Tr., 488) It would appear, under the circumstances, that Mrs. McLendon should have told at least Louise Oettinger, who was going to edit the story, of the situation and shown her the report, especially since Mrs. McLendon remembered quite clearly that she had shown the report to at least two other persons in the office.

Even upon the assumption that the Blue report was a hand-out, I am of the opinion that Mrs. McLendon's use of it far exceeded permissible limits. At the risk of tiresome repetition, Mrs. McLendon did not merely appropriate an occasional word, phrase, or sentence, but substantial portions of material. I have examined the many exhibits submitted by the Guild; in the vast majority, they do not approach the type of situation we have here, and the few which do approach it do not, in my judgment, come anywhere near establishing that Mrs. McLendon's use of the Blue manuscript conforms to approved practice on large metropolitan newspapers. There is not the slightest evidence that the Publisher has condoned such conduct; in the nature of the case, detection of such conduct is difficult. From the fact that it has occurred, one may not, without more, infer that the Publisher is indifferent to, or condones, it.

We turn finally to consideration of the time available to Mrs. McLendon for doing the Prospect House story. At the hearings and in its brief, the Guild insisted that there was simply not enough time allowed for doing the job properly. Mr. Bradlee, asked whether he had given consideration to Mrs. McLendon's deadline and the pressure of time, answered: "Not particularly, no. Everybody has a deadline." (Tr., 189) It is the Publisher's position that there was not any unusual pressure of time and that this is not a mitigating factor.

It is not necessary to repeat Mrs. McLendon's testimony (see above, 6). According to that testimony, which was not disputed by the Publisher, Mrs. McLendon did not begin writing the Prospect House story on Saturday until about noon, though she had done a "rough lead" ("maybe two or three pages") on Friday. Quitting time was 4:30 p.m. on Saturday; Mrs. McLendon was scheduled to leave for her vacation on Monday. She estimated that she had no more than three hours on Saturday "at the very most" to do the story.

Even assuming that she had an hour or two more, it seems to me crystal-clear that it was impossible for her to do the kind of job described by the authorities at The Post as their standard within the available time. Mr. Wiggins spoke of a "creative product" (Tr., 92) and "original research." (Tr., 111) He stated: "I would expect him to look up the relevant literature, write his own piece about it, and where he quoted from it, make that clear." (Tr., 109) And he added: "A researcher gets his material from many sources, and a plagiarist gets his from one." (Tr., 124) It can scarcely be contended that within the space of three to five hours it would be possible to "look up the relevant literature" covering the history of a 150-year old house, of its numerous occupants (all or most of whom were quite obscure), of any interesting peripheral material (e.g., famous guests), and write a 1500-word feature story. Not only could not Mr. Wiggins' research standards be conformed to in so short a time-span, but even the preliminary task of sorting out names and dates could scarcely be accomplished, let alone the writing.

In its brief, the Publisher argues implicitly that a comparison of the Prospect House story with the others done that week (Guild exhibits 106, 107, 108, and 109) compel the conclusion that sufficient time was available for the Prospect House story. I have read these stories carefully and they seem to be not at all comparable. Three of them, and possibly all of them, are shorter than the Prospect

House story. Much more significant is the fact that none of them calls for the kind of research required in the case of Prospect House. None involves a long time-span; viewed together, they are based apparently almost in their entirety on interviews. To put these stories on the same footing with the story on Prospect House ("a story is a story") is to emphasize form rather than substance; it is not, I think, a fair comparison.

It is, of course, impossible to say what kind of story Mrs. McLendon would have written if she had had more time. And the pressure of time cannot be regarded as a warrant for the appropriation of another's literary product without attribution. Nonetheless, we ought not ignore the fact, as testified to by Louise Oettinger, that a reporter who has much to do and little time in which to do it may use much more than "a sentence here and a sentence there" in the verbatim use of a release. (Tr., 341) I think it is clear that in Mrs. Oettinger's term, Mrs. McLendon was "rather pushed."

Under the circumstances, it is my opinion that the Publisher was justified in dismissing Mrs. McLendon for "good and sufficient cause" but not for "willful neglect of duty or gross misconduct."

April 17, 1968

/s/ EMANUEL STEIN
Emanuel Stein, Arbitrator

BEFORE ARBITRATOR EMANUEL STEIN

Brief of the Washington-Baltimore Newspaper Guild

ARGUMENT

"Then you should say what you mean," the March Hare went on.

"I do," Alice hastily replied; "at least—at least I mean what I say—that's the same thing, you know."

"Not the same thing a bit!" said the Hatter. "Why you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'."

I. The Company's Alleged "Standard" of Plagiarism Is At Variance With Common Practice at The Post And In the Industry At Large, Was Never Disseminated to Mrs. McLendon Or the Reporting Staff, And Cannot Justify the Discharge.

It is clear that in view of the circumstances under which Mrs. Chatham gave the Blue report to Mrs. McLendon and authorized its use, Mrs. McLendon reasonably concluded that the report was a "hand-out" and could be treated as such.

At the time she received the report from Mrs. Chatham and wrote the story, Mrs. McLendon had not been informed that the report had been prepared for the Fine Arts Commission and nothing on the document itself indicated that it was prepared for anyone other than Mrs. Chatham. Inasmuch as Mrs. Chatham treated the report as her own property and made no mention of Mrs. Blue, Mrs. McLendon did not act unreasonably in concluding that Mrs. Chatham was the lawful owner of the report and could, as she did, authorize Mrs. McLendon to make full use of it. After all, Mrs. McLendon had no cause to be suspicious of Mrs. Chatham's apparent ownership of the report because Mrs. Chatham was the owner of Prospect

House. Similarly, Mrs. McLendon had no reason to question the apparent authenticity of Mrs. Chatham's ownership of the report when Mrs. Chatham directed her not to mention the document in her article. Mrs. McLendon reasonably believed that Mrs. Chatham, for reasons of her own, did not wish to disclose that she had had the report prepared and Mrs. McLendon placed the report in the same category as the inventory which Mrs. Chatham earlier had cautioned her not to mention in the article.¹

Moreover, the document was merely a commonplace, factual recitation of the history of a private home and its past owners; there was nothing monumental or even important about the document which would cause any experienced reporter to regard it as anything but a "fact sheet" or "hand-out" routinely distributed by the owner of an historic private home which was soon to be placed on sale. Thus, under the circumstances prevailing at the time Mrs. McLendon received the report and Mrs. Chatham's authorization to use it freely, Mrs. McLendon reasonably concluded that it was a "hand-out."²

It is equally clear that when Mrs. McLendon wrote the Prospect House story she was operating under severe time and deadline restrictions that were placed upon her by Marie Sauer, the Women's Editor, with Miss Sauer's full knowledge of the already short supply of time which Mrs. McLendon had to complete the unusually long story on Prospect House. Mrs. McLendon had but 3 or 4 hours to write a story which would normally take a reporter one

¹ Nor did the New York Times article raise any doubts in Mrs. McLendon's mind inasmuch as the Times article referred to a new report of the Fine Arts Commission. Mrs. McLendon had no reason to connect the Blue report with the report mentioned in the Times article and Mrs. Chatham told her that there was nothing new in the typewritten document which she gave to Mrs. McLendon.

² Even apart from all the circumstances, James Reston, an expert witness for the Company, testified, "I would assume that it was a hand-out from just reading it, yes. (R. 361).

or two full days to complete. Miss Sauer knew that Mrs. McLendon did not have the time to do a first rate job on the Prospect House story and refused to grant her any overtime in order to write the story. Thus, Mrs. McLendon readily acknowledged that the story was a "hack" job but it was the best she could do within the time allotted her. Finally, Mrs. McLendon did not seek to hide the report from her co-workers or her superiors; she did not handle the report with guile or with deception. She merely treated the document as a routine hand-out and wrote her story accordingly while operating under a severe time restriction and a stricture from Mrs. Chatham not to mention the document in her article.

Under these circumstances, Mrs. McLendon utilized the Blue report as a "hand-out" in writing her story to supplement her interview of Mrs. Chatham, her knowledge of the house from past experience, and her brief examination of the "clip" file. Mrs. McLendon paraphrased some of the report; she quoted some of the anecdotal material in it by using quotation marks but without attributing it to source in line with Mrs. Chatham's instructions; she quoted a newspaper article by using quotation marks and properly attributing it to a newspaper article; and she used some basic factual information verbatim (approximately nine sentences, half-sentences and phrases) without attribution.

The Company later discharged her for "gross misconduct" in that she committed "plagiarism" in writing the Prospect House story. It is difficult to discern the criteria for plagiarism which the Company contends Mrs. McLendon violated. On the one hand, the Company argues that it makes no difference whether Mrs. McLendon paraphrased the report, quoted the report, quoted material from a newspaper article which in turn was quoted in the report, or used the material verbatim; in the Company's eyes, 52 percent of the paragraphs in Mrs. McLendon's article came in one way or another from the Blue report and thus Mrs. McLendon committed gross misconduct by

using the document so extensively without attributing it to a hand-out, or to Mrs. Blue or to the Fine Arts Commission (R. 10-11, 63, 96-97, 240, 243). In the Company's view it made no difference that the report was a hand-out (R. 23) or the time Mrs. McLendon had to write the story or whether she knew who Mrs. Blue was or that it was prepared for the Fine Arts Commission. The "standard" now advocated by the Company is that whenever material comes from a document, the paraphrase, the quotes, the quotes of quotes within the document, and verbatim usage *must all* be attributed to the source (R. 231, 240, 260-261).³

The testimony also disclosed yet another "standard" advocated by the Post which Mrs. McLendon allegedly violated in the instant case; in writing the story she did not do original research (R. 112-113, 123-124) and in the words of Mr. Wiggins, "I would regard it as a kind of plagiarism" (R. 124). He testified, "The work of a reporter is supposed to be original creative work. That is what he is paid for . . . I would expect him to look up the relevant literature, write his own piece about it, and where he quoted from it, make that clear." (R. 109). Mr. Wiggins' demand for original research must be contrasted with the 3 or 4 hours Mrs. McLendon had to write a 1500 word story.

The principal difficulty with the Company's case is that the record is totally barren of any evidence that the Com-

³ It is significant to note that while the Company viewed Mrs. McLendon's failure to attribute any of the material to source as a heinous crime, it found no fault with its own editors who copyread the hard copy even though it was obvious that much of Mrs. McLendon's story must have been based upon historical documents rather than interviews. Indeed, one of the principal fallacies with the Company's case is that Mrs. Oettinger, the editor who handled the copy, *assumed* that much of the story was based upon documents and nonetheless let the story go through without any attribution because in fact the policy of the copydesk in the Women's section was *not* to require specific attribution to documentary source. The testimony of Mrs. Oettinger alone when contrasted to the "standards" now alleged by Mr. Bradlee and Mr. Wiggins leads unescapably to the conclusion that the instant case involves much ado about nothing.

pany had ever announced these alleged "standards" at any time before the hearings in the instant case (R. 140). There is simply no evidence in the record that these "standards" for the treatment of "hand-out" material—which Company witnesses acknowledged time and again were imprecise and difficult to apply in any given case—were made known to Mrs. McLendon or the staff at large before she wrote the Prospect House story. Moreover, the "standards" which Mrs. McLendon allegedly violated must be weighed in the light of the testimony by Mr. Bradlee, Mr. Wiggins, the Company's own expert witness Reston, Mrs. Oettinger, the Guild's expert witnesses, and the great bulk of exhibits introduced by the Guild that:

(a) Paraphrase of hand-out material without any attribution is permissible journalistic practice and is widely utilized throughout the industry (R. 59, 142, 200-205, 209-210, 212-217, 224, 226-227, 228-229, 267, 344-346, 360, 362, 367, 368, 377, 399-401, 405-406, 483-484 and Union Exhibits);

(b) Quoting of hand-out material without attribution to the particular source (e.g., "floating quotes"; Captain McCauley said; legend has it; etc.) is permissible journalistic practice and is widely utilized throughout the industry, though at worst such practice is confusing or sloppy (R. 37-39, 56-59, 60, 128-130, 137-138, 228, 294-296, 331-332, and Union Exhibits);

(c) Quoting material which is itself quoted within the hand-out, without attribution to the hand-out but with attribution to the original source (e.g., a newspaper article appeared during the time accusing the State Department of staging "propaganda parties," etc.), is permissible journalistic practice (R. 104-105, 137-138, 219-220, 224-225, 226, 333-334);

(d) Verbatim usage of factual or historical hand-out material without attribution to the extent utilized by Mrs. McLendon (as distinguished from "marking

up" a press release or the wholesale lifting of an entire release) is permissible journalistic practice and is a practice that is widespread throughout the industry (R. 69, 341-344, 349-350, 364-365, 368, 402-406, 489-494, and Union Exhibits).

Thus, the exhibits introduced by the Guild and the testimony of the expert witnesses⁴ clearly show that Mrs. McLendon did not violate either the contemporary standards of the Washington Post or any commonly recognized ethical journalistic standards. Mrs. Oettinger, who is an Editor in the Women's section and a witness produced by the Company, perhaps best summed up the actual standards of the Washington Post: It is not rare for reporters to pick up hand-out material verbatim (R. 341); when a reporter is "pushed", she "would pick up more than you would otherwise" (R. 342); if a reporter were pushed and "picked up" a quantity of hand-out material verbatim, Mrs. Oettinger, as an Editor, would not think it improper for a reporter to do so because the circumstances would permit such usage of hand-out material (R. 343-344); the extent of any policy with respect to the use of hand-out material was that the Women's Editor in training new reporters would tell them "to put some originality into the writing of *shorts*" (R. 343); that permissible practice with respect to verbatim usage of hand-out material would be "some types of stories, just a few sentences would be too much. *Where other types of stories, where you are recounting more the lore and the legend material, it seems*

⁴ Mr. Child's personal journalistic standards and his characterization of the Blue report were so at variance with the exhibits and the testimony of all the other witnesses, even Company witnesses Reston and Oettinger, that his testimony is not entitled to great weight. Similarly, Mrs. Dudman's unequivocal testimony that the Washington Post "never" uses hand-out material verbatim and "never" runs Women's Wear Daily copy without attribution proves in the light of the Union's Exhibits that either Mrs. Dudman knows nothing about the writing in the Social section or that her testimony in these respects was simply untruthful. Dean English's "testimony", we submit, needs no comment.

to me permissible to use more" (R. 350, emphasis supplied).

Similarly, Mrs. Oettinger testified that it was *not* the policy or practice of the Washington Post to attribute to source when a reporter uses "written records or historical material" as the basis for portions of an article (R. 344-345). It is equally clear from Mrs. Oettinger's testimony that it was *not* the policy or practice of the Washington Post to attribute to the hand-out itself any materials quoted from it; Mrs. Oettinger testified that she assumed that the long "floating quote" had been "picked up" by Mrs. McLendon from *documents* in Mrs. Chatham's house and that "it didn't seem logical that Mrs. Chatham would have related the story" (R. 332). Nonetheless, Mrs. Oettinger deleted the quotation marks and regarded that material as properly attributed with the phrase "a story is told" (R. 332). Finally, Mrs. Oettinger believed that the attribution of the newspaper article quotation was sufficient (R. 333).

In sum, Mrs. Oettinger, Miss Lewine, Mrs. Shelton and Mr. Reston⁵ agreed that with respect to hand-outs, paraphrase, quotation, quotes of quotes, and verbatim usage, *all without attribution to the hand-out*, are normal journalistic practices particularly where the reporter is being "pushed" and the material is historic or factual or "where you are recounting more the lore and the legend." In the words of Mrs. Lewine, "I think it is common practice, and commonly understood, that this material is available for use by reporters as they see fit . . . generally speaking if

⁵ Mr. Reston agreed that Mrs. McLendon's paraphrasing of the hand-out was proper (R. 360, 367-368, 377). Mr. Reston also agreed that seven to 10 sentences of verbatim usage from a hand-out, where the verbatim usage involved basically factual material, he did not find "too hard to live with" (R. 368). Reston noted that, "again, it is not good practice, but—you know, say it was built on such-and-such a date. There are not many ways in which you can say that" (R. 368). It is important to note here that Mrs. McLendon's verbatim usage consisted of just that kind of material, and Union Exhibit 83 exhibits it clearly. What Mr. Reston found objectionable in the abstract is wholesale verbatim copying of the bulk of a press release.

the reporter believes the material to be correct, it is common practice to use this material without generally attributing it to source . . . it varies considerably, and it depends on the reporter's particular needs for a story, and the circumstances under which he is covering the story, and a large number of things might enter into it . . . that sort of material would be used as background, then laced into the story perhaps . . . I don't think there are really any norms. I think the situation is reporters know they can use material provided to them in press releases. That is the purpose of the press release, and they have to assess it, and make their own judgments as to what they use, and what the practice is I would say varies quite considerably." (R. 400, 402, 404, 406).

But Mr. Bradlee and Mr. Wiggins testified that paraphrased material must be attributed to source; quotations must be attributed to source even if the person quoted is dead; when a reporter uses a quotation which is attributed in the source material to a newspaper article he must attribute that quotation not only to the newspaper article but also to the source in which he found the quotation; and finally, that verbatim usage must be attributed even if it concerns historical fact as long as it isn't a guest list or the age of a person. Mr. Wiggins acknowledged that his and Bradlee's "standards" with respect to hand-outs and plagiarism were never disseminated to the employees of the Post (R. 140). And Mrs. Oettinger testified that the Bradlee-Wiggins "standards" were not in fact the policy or the practice of the Women's section of the Post. In addition, the exhibits introduced by the Guild show conclusively that these "policies" had not been practiced either in the past or in the present at the Washington Post. Moreover, the Guild's exhibits show that from the very nature of the materials themselves, the editors, or at least the Women's Editor at the Post, must have known of the practice and either had condoned it or did not recognize anything wrong with it.

However, in response to the abundance of Guild exhibits which showed that Mr. Bradlee's "standards" were not the practice of the Post or in the industry at large, Mr. Bradlee testified, incredibly enough, that he believed each of those reporters knew they were doing something wrong (R. 281). Indeed, Mr. Bradlee testified that Miss Sauer, the Women's Editor, must have herself practiced what Mr. Bradlee regarded as "plagiarism" in editing the multi-article series entitled "White House Brides" (R. 286). Mr. Bradlee acknowledged that he "rewrote the leads on a couple" of the Brides stories and that he read the hard copy "in some stories" of the Brides' series (R. 285). He assumed that the great mass of facts cited in the stories (indeed, copied verbatim, paraphrased, and quoted) came from "history books" (R. 286). Yet, Mr. Bradlee offered no explanation for the plain fact that there is not one single attribution to any source material anywhere in the five multi-page articles and that on the face of the articles he and the other editors would have had to have been aware of that fact (R. 286-287). Nor could Mr. Bradlee explain that if such was the practice with respect to the Brides story and the other Guild exhibits from the Washington Post, how could he maintain that Mrs. McLendon violated the Post's standards when she was dealing with hand-out material and her use of it was much less extensive. Finally, the Post did not produce Miss Sauer as a witness to rebut the testimony about the *actual* practice and policy of the Women's section and to rebut Mrs. McLendon's testimony that Miss Sauer had agreed that she had not done anything wrong "if it was a hand-out." (R. 475).

Yet, despite the overwhelming weight of evidence in the record as to contemporary standards at the Post and elsewhere as to use of hand-out material, Mr. Bradlee and Mr. Wiggins steadfastly maintained that paraphrase *must* be attributed to source, quotations *must* be attributed to source, quotes of quotes *must* be attributed to two sources, verbatim usage *must* be attributed to source, and that it

was Mrs. McLendon's alleged violation of *all* of these "rules" which justified her discharge for gross misconduct.⁶

We respectfully submit that these alleged "standards" of Mr. Bradlee and Mr. Wiggins existed only in their minds. Mr. Bradlee and Mr. Wiggins acknowledged that unfortunately they are far removed from the everyday practice of the newspaper and its reporters dealing with a deluge of hand-outs. Their academic tests of plagiarism when related to the abundant use of hand-outs simply is not the practice at the Washington Post or in the industry at large. Newspapers are not Ph.D theses; newspaper reporters are not original historical researchers. Every newspaper everyday is crammed full of all sorts of factual material which obviously has been garnered from written material but is not attributed to source. If the reporter is confident that the source is authentic (and here, after all, Mrs. Chatham was the owner of the house) and the material is factual rather than creative prose, attribution in practice is largely unnecessary and the failure to attribute does not constitute plagiarism.

Bradlee's and Wiggins' previously unpromulgated "standards" are "Camelot" standards which—undisseminated, unclear, unknown by Mrs. McLendon or by Washington reporters in general—simply cannot be used to support the discharge for gross misconduct under the facts of this case.

And if it could be said as a matter of hindsight that, in the abstract, Mrs. McLendon might have inched over some

⁶ There is no testimony in the record that the Company would have discharged Mrs. McLendon if she had only violated the Bradlee-Wiggins "rule" with respect to verbatim usage. To the contrary, the Company argued and Bradlee and Wiggins so testified that it was for the very reason that Mrs. McLendon paraphrased without attribution, quoted without attribution and used verbatim without attribution that she was discharged. Thus, the Company's case must fall if the arbitrator finds that the Company did not carry its burden of proving that Mrs. McLendon clearly violated contemporary standards with respect to *all four elements* (paraphrase, quotation, quotes of quotes, and verbatim).

imaginary line with respect to some quantity of her story, that imaginary line simply cannot be discerned in practice. Nor can that imaginary line be used to justify the discharge, for no less than "gross misconduct", of an experienced, qualified, and capable newspaperwoman with 13 years of unblemished service for the Washington Post.

The Company overreacted to Mrs. Blue's complaint. It decided to discharge Mrs. McLendon by drawing red lines under every word of the Prospect House story which had even the most tenuous relationship to the Blue report without pausing to analyze or even inquire as to the circumstances, without analyzing whether the report was a hand-out, without determining what was the actual practice of the newspaper's reporters in using hand-out material, without bothering to analyze whether some of the underlined portions were proper paraphrase, without discerning whether any quotation marks were edited out of the hard copy, without reflecting whether Mrs. McLendon's attribution to the Times-Herald newspaper article quotation was sufficient, without analyzing whether the "floating quotes" clearly indicated that the words quoted were not Mrs. McLendon's and without examining the material used verbatim to discern whether it was basic factual information rather than descriptive narrative.

Thus, the true significance of the testimony of the expert witnesses, the Guild's exhibits, and the fact that the Company is unable to discover any precedent for the discharge of a reporter for plagiarism, particularly with respect to the use of hand-outs, is that in the words of Miss Lewine there are not "really any norms."

If the Washington Post wishes to establish standards for the treatment and attribution of hand-outs and other documents which are in line with the views of Mr. Bradlee and Mr. Wiggins, let them establish those standards and so inform the working reporters. If such standards are established, the Guild and the members of the bargaining unit

will attempt to live and work under them and if an employee knowingly violates them, appropriate discipline can be invoked. But to reach out and pluck off the head of an experienced reporter for allegedly violating ethical standards of which she and reporters at large are unaware simply does not constitute "good and sufficient cause" within the meaning of the collective bargaining agreement. The principle that reporters should not commit plagiarism is a salutary one; but the question is did Mrs. McLendon knowingly, wilfully, and deceitfully violate it under the facts of this case.

The Guild has no quarrel with the right of a newspaper to establish ethical standards for the treatment of hand-outs and what does or does not constitute plagiarism. Indeed, the *raison d'être* of the Guild as embodied in Article 1 of the American Newspaper Guild Constitution is "to raise the standards of journalism and ethics of the industry." We have no quarrel with the principle that reporters must not knowingly commit plagiarism; must not knowingly, deceitfully, deceptively pass off the words of another as their own. What we do take issue with is the *ex post facto* application of standards which are at variance with the everyday usage and practice of working reporters dealing with hand-outs under deadline pressures and demands by editors to produce copy NOW to fill the gaping jaws of column after column of newsprint which make up a daily newspaper.

II. *Under the Circumstances, Discharge Was Too Excessive a Penalty to Constitute "Good and Sufficient Cause."*

Assuming *arguendo* only that Mrs. McLendon violated good practice in her treatment of the Blue report in writing the Prospect House story, discharge was too severe a penalty to constitute "good and sufficient cause."

It is undisputed that Mrs. McLendon was a competent, capable, highly experienced newspaperwoman. Her record

of 13 years of employment as a reporter with the Washington Post was without blemish. The record reflects that her contemporaries in the newspaper industry submitted letters attesting to her excellent reputation for ethical behavior and outstanding journalistic performance. It is apparent that she has been a credit to the Washington Post and to the newspaper profession.

It is clear that Mrs. McLendon practiced no deceit in writing the Prospect House story. After 13 years of employment for the Washington Post covering the White House and the Washington social scene, Mrs. McLendon did not have to impress her editors with her journalistic skill by deceitfully appropriating a few half-sentences and phrases of factual historical material from a volunteer researcher. At worst, when "pushed" by her editor to produce a story in one-fifth the normal time and denied permission to use overtime to complete the story, she practiced something less than the best journalism and admittedly so. She assembled a story instead of creatively originating one. But she was working within a time stricture knowingly imposed upon her by her editor and, in good faith, within a stricture imposed by Mrs. Chatham not to mention the report in her article.

Perhaps if the Blue report were some important document of State, some revelation of significant history, Mrs. McLendon should have brought the report to the attention of the editor and requested instruction as to how to deal with it. But the document was a commonplace one, the "history" recited in it uncontroversial and merely interesting. Aside from the mundane facts used verbatim, such as General Lingan's wounds from a Hessian bayonet and that in 1858 John Templeman's descendants sold the house for a little less than \$5,000 to Thomas T. Mann, a medical doctor, neither editor nor reader could be really deceived that the material quoted from the report were Mrs. McLendon's and not someone else's words. That the editor and the reader did not know that the material in quotes

came from Mrs. Blue's pen instead of some unknown source is of little moment. That Mrs. McLendon attributed the quote from the Times-Herald newspaper article to the article itself and not also to the Blue report is hardly a violation of journalistic ethics.

What is at stake here is a career—a professional career of long, unblemished service which, as a practical matter, cannot be re-established elsewhere. No newspaper will hire a reporter discharged for plagiarism and when arbitrators refer to discharge as the capital punishment of the industrial world, in the instant case it amounts to the extinction of any means or gainful employment within the entire industry.⁷

What the Guild has sought to demonstrate is not that "hearts and flowers" should prevail, but rather that either no crime at all was committed or that when the punishment is assessed in the light of the alleged crime—when all the facts and circumstances are accounted for in this case—it is simply unconscionable for the discharge of Winzola McLendon to stand.

Respectfully submitted,

SPELMAN, LECHNER AND WAGNER

By /s/ IRA M. LECHNER

Ira M. Lechner

*Attorney for The Washington-
Baltimore Newspaper Guild,
Local 35 of the American
Newspaper Guild, AFL-CIO*

March 11, 1968.

⁷ The company has sought to buttress a weak case and to deter reinstatement by producing testimony that the relationship between editor and reporter is too fragile to withstand conduct such as Mrs. McLendon's. To the contrary, the employer-employee relationship is made of much more durable fibre. And the Arbitrator should note the provisions of Article VI(3), second paragraph, with respect to the contractually agreed upon limitations upon the Arbitrator's award and the counter measures available to the Company. This clause, commonly referred to as the "immoral clause", has never been invoked and the Guild strenuously opposes its invocation by the Company.

Brief of the Washington Post

The issue before the arbitrator in this case is:

“Whether the dismissal of Mrs. Winzola McLendon was justified under the provisions of the applicable labor agreement.”

I. STATEMENT OF FACTS

The American Institute of Interior Designers scheduled their annual convention to be held in Washington from September 8 to 13, 1967. The Women's Editor of The Washington Post decided to run a story on one of Washington's great houses, Prospect House, during that period. She thought this would be of interest to the readers of The Washington Post, as well as to the delegates to the A.I.I.D. group.

The Women's Editor, Miss Sauer, gave Mrs. McLendon the assignment and requested that a story be done on the furnishings of the house, the architectural features, the value of the house, and Mrs. Chatham's feelings concerning it. Miss Sauer gave Mrs. McLendon a copy of the New York Times story of August 4, 1967, on Prospect House, written by Myra MacPherson. This assignment was made on Monday or Tuesday, August 28 or 29, 1967. (Tr. p. 439). Mrs. McLendon made an appointment to interview Mrs. Chatham. She arrived at Prospect House at 10:00 a.m., Thursday, August 31, 1967. She interviewed Mrs. Chatham about the house and persuaded her to show her an inventory list of the contents of the house, and, in addition, the typed material on the history of the house, which has been established to be a report prepared by Mrs. William Blue for the Fine Arts Commission. (Tr. pp. 73, 88, 506, 518, 519; Co. Exh. 4). When the Blue report was shown to Mrs. McLendon she asked Mrs. Chatham if she could take it back to her office with her. Mrs. Chatham agreed to this and did so with the understanding it would be returned promptly to her, and that Mrs. McLendon would

not mention that she had the report, even though she could use its contents. (Tr. p. 449).

Mrs. McLendon returned to the office on Thursday, made some notes from the Blue report and worked on another assignment she had, namely, the "Amerika Illustrated" story. (Tr. pp. 452-453; Union Exh. 108).

On Friday, September 1, 1967, Mrs. McLendon worked on the "hair story" (Union Exh. 109), and wrote the lead and several pages on the Prospect House story. She showed these to Mrs. Louise Oettinger, the person who would edit her story, asked her to look it over to see if there were any questions, and told her that she would finish it on Saturday. (Tr. p. 457). Mrs. Oettinger read the draft, and had no questions. (Tr. pp. 324-325).

On Saturday, she came in to work at 8:00 a.m., and checked the Sunday early run until 10:00 a.m. She then was released from this work to complete the Prospect House story. (Tr. pp. 458-459).

Upon completion, Mrs. McLendon left the article in Mrs. Oettinger's basket. (Co. Exh. 3). She also left a note to remind that she was leaving for Europe on Monday, September 4, 1967, at 8:40 p.m., and listed the hotels where she would be staying while there. (Tr. p. 464).

On Monday, September 4, 1967, Mrs. Louise Oettinger, an assistant women's editor of the Post, found the story written by Mrs. McLendon in her basket. She put it in her Thursday work pile and edited the copy on Thursday, August 7, 1967. (Tr. p. 337). When Mrs. Oettinger obtained the story on Monday there was no source material attached. (Tr. p. 326). Mrs. Oettinger testified that she was aware that Mrs. McLendon had interviewed Mrs. Chatham, and her testimony explained why she believed Mrs. Chatham to be the source of all material not otherwise attributed, and why she therefore deleted quotation marks in some instances and changed them in others. (Tr. pp. 326-335). After she edited the copy on Thursday it was

sent to the composing room for setting. The story ran in the Post on Sunday, September 10, 1967. (Co. Exh. 2).

On October 11, 1967, The Washington Post received a letter from Mrs. William Blue (Co. Exh. 5) in which she complained that almost all of the historical material so liberally quoted in the September 10 story on Prospect House was taken from a historical survey of Prospect House she had prepared for the Fine Arts Commission. She stated that Mrs. McLendon had failed to credit her or the Fine Arts Commission and had not asked permission to use any part of the study from any member of the Commission or Mrs. Blue, the author. This letter was turned over to Mrs. Helen Dudman, Executive Editor of the Women's Department, and she called Mrs. McLendon on the telephone. (Tr. p. 314). Mrs. McLendon had returned from Europe on October 5. She had worked October 6, 7 and 8 and became ill on October 9. She was home ill on October 11 when Mrs. Dudman called her. (Tr. p. 469).

When Mrs. Dudman questioned Mrs. McLendon about the Blue report she said that when she wrote the story she used clips from the library, a clipping from the New York Times story by Myra MacPherson, an insurance inventory, and the Blue report that Mrs. Chatham had given her. (Tr. p. 314). Mrs. Chatham had told her she could use the Blue report but that she was not to reveal where she had obtained the information. This material and her conversation with Mrs. Chatham were the basis of the story she had written. Mrs. McLendon told Mrs. Dudman that she had used only two or three sentences from the Blue report, and the phone conversation ended. (Tr. pp. 470-471). A short while later Mrs. McLendon called Mrs. Dudman back and said that she should not mention the amount of material she used from the Blue report—just say it was obtained from Mrs. Chatham. (Tr. p. 470).

Mrs. Dudman then telephoned Mrs. Blue and explained that some of her material had been used by Mrs. McLendon; that it had been given to her by Mrs. Chatham. Mrs.

Blue said, "You don't know how much of the material was used," (Tr. p. 315), and Mrs. Dudman suggested that Mrs. Blue come in to the office and discuss the matter.

Mrs. Blue and a Miss Nancee Black, the staff member of the Fine Arts Commission in charge of the volunteers who do historical research, came in on Tuesday, October 17, 1967.

Mrs. Blue had a copy of her report and a copy of the story that appeared in The Washington Post on Sunday, September 10, 1967. Mrs. Blue had underlined the material that corresponded either exactly or similarly to the material that appeared in her report that had taken six months to prepare. (Co. Exh. 8; Tr. pp. 73-73a, 315).

Mrs. Dudman reviewed the material and noted that a great deal of it was copied. She then called Mrs. McLendon in to her office and introduced her to Mrs. Blue and Miss Black. Mrs. McLendon said she was sorry that Mrs. Blue felt as she did; that she had obtained the material from Mrs. Chatham; that she thought it was a hand-out. Mrs. Dudman then asked her to hold the newspaper story that Mrs. Blue had underlined, and she read from Mrs. Blue's report. Mrs. McLendon acknowledged that it was similar, but made comments to the effect, "I changed a couple of words here," or, "I changed a couple of words there." (Tr. p. 316). Mrs. McLendon testified that when shown Mrs. Blue's marked copy of the article, she said, "Oh, I couldn't have used that; I know that is wrong. I didn't use all that." (Tr. p. 471).

Mrs. Dudman then asked Mrs. McLendon to do a story on the Fine Arts Commission. Mrs. McLendon interviewed Miss Black, but never completed the assignment. (Tr. p. 317).

When Mrs. Blue and Miss Black left, Mrs. Dudman reported the incident to Managing Editor, Benjamin Bradlee. She gave him Mrs. Blue's letter, the Blue report, and the newspaper article underlined by Mrs. Blue. (Tr. p. 318).

Mr. Bradlee decided to discuss this with the department head, J. Russell Wiggins, who is the editor of the Post. He gave him a report of what Mrs. Dudman had told him and showed him Mrs. Blue's letter and the Blue report and the newspaper article. Mr. Bradlee said he had not made the comparison but would do so that night. He took the material home and underlined the Blue report where it corresponded to the newspaper article. (Co. Exh. 10; Tr. p. 20). The next day he discussed the matter with Mr. Wiggins, Mr. Daly and Mr. Kennelly. Mr. Bradlee testified that he came to the conclusion that great chunks of the Blue report had been lifted and used by Mrs. McLendon without attribution whatsoever to the source of the material. (Tr. p. 20). Mr. Bradlee decided that he wanted to talk to Mrs. McLendon about the story she had written, and that he would not reach any final conclusions until he had spoken to her. (Tr. p. 21).

Mr. Bradlee saw Mrs. McLendon on Thursday, October 19, 1967. Mr. Bradlee said he had the letter Mrs. Blue had sent to the Post and a copy of the Fine Arts Commission Report and the story written by Mrs. McLendon. He said he had checked the report and the story and saw that the story had been taken largely from the Fine Arts Commission Report, and he asked Mrs. McLendon for an explanation.

Mrs. McLendon said she had obtained the material from Mrs. Chatham and that she considered it a fact sheet. (Tr. pp. 500-501). She had been told by Mrs. Chatham that she could make any use of it she saw fit, but that she was not to mention that she had the document. (Tr. p. 500). Mrs. McLendon said that people use fact sheets all the time, and she saw nothing wrong in the use of the material. (Tr. p. 501). After a long discussion, Mr. Bradlee informed Mrs. McLendon that she was discharged for gross misconduct. (Tr. pp. 22-23). Mrs. McLendon then said if what she had done was wrong, was there another job she could be assigned to. She mentioned a desk editor's job

at night or a make-up editor's job in the composing room. (Tr. pp. 23-25).

Mr. Bradlee said his trust and confidence in her had been broken and that he would not give her either of those positions. In his opinion she had lost her usefulness as an employee, and he had no alternative but to discharge her. (Tr. p. 25).

Mrs. McLendon's article contained 1295 words in 36 paragraphs. Sixteen of these paragraphs, containing 667 words, or about 52% of the total words in the article, were paragraphs copied—taken verbatim or by paraphrase—from the Blue report. Of these 667 words, approximately 550, or about 42% of the article's wordage, were virtually taken verbatim from the report. The relevant portion of the report's historical section, pages 7 through 15, contained 1979 words. About 28% of these words were used in Mrs. McLendon's article. (Co. Exh. 2, 3 and 4).

On the afternoon of Thursday, October 19, 1967, the Chairman of the Guild asked for a meeting with Post management. This meeting was held, and the Guild asked for Mrs. McLendon's reinstatement. This was denied and the matter went to arbitration.

II. ARGUMENT

The basic issue in this dispute is whether Mrs. McLendon was properly discharged under the applicable labor agreement for the use she made of the Blue report in preparing her article on Prospect House. The Company contends that such use was gross misconduct, constituting plagiarism,*

* While plagiarism is the apt description of the misconduct involved, it is clear that this grievance cannot be resolved solely by a determination whether the conduct is plagiarism in its customary legal sense, although the legal rules are relevant and material in appraising Mrs. McLendon's conduct. Under the applicable contract (Jt. Exh. 1, Article VI, Par. (3)), the discharge was for gross misconduct, and its justification depends upon the appropriate evaluation of all the pertinent facts involved in Mrs. McLendon's actual use of the Blue report in her article.

and, upon discovery and verification, fully warranted her discharge without severance pay.

In the record of this proceeding there is much testimony and evidence which lacks relevance to and materiality on the issue and serves only to divert attention from the pertinent and relatively few facts essential to the appropriate evaluation of Mrs. McLendon's conduct. All that is required to justify the discharge is to establish the simple facts that Mrs. McLendon did, without disclosure to her employer and its readers, copy from the Blue report that magnitude of material which the pertinent documents reveal are identical or similar in each. This is the standard by which her conduct was judged by the Managing Editor, Mr. Bradlee, who made the discharge decision, and the Editor, Mr. Wiggins, with whom Mr. Bradlee consulted. (Tr. pp. 19-25; 61-70; 9-92; 121-126; 138-140). In fact, however, Mrs. McLendon's conduct went beyond this basic form of journalistic plagiarism.

The additional facts are that Mrs. McLendon obtained Mrs. Blue's report under circumstances which should have alerted her to the necessity of not complying with Mrs. Chatham's injunction not to identify it as her source (Tr. pp. 169, 449); that she did know, from Myra MacPherson's New York Times article of August 4, that what she possessed was a report prepared for the Fine Arts Commission (Tr. pp. 510-515); that she made no effort to ascertain from Mrs. Blue or the Fine Arts Commission whether she could use the document as a source, or why Mrs. Chatham did not want her possession or use of the document disclosed (Tr. pp. 524-538); and, that she did make extensive use of the Blue report, without permission or attribution, in a manner which unmistakably deceived editors and readers into believing that the article was wholly the product of Mrs. McLendon's research and creative writing, when in fact it was in major part copied from the Blue report. (Co. Exh. 2, 3 and 4).

If this performance does not represent gross misconduct for a fully experienced professional journalist, justifying discharge, then it is difficult to imagine what kind of fraudulent conduct by a professional writer on the staff of a major metropolitan newspaper could warrant discharge. Nothing in this record excuses or justifies the plain misconduct of Mrs. McLendon's performance.

A. THE FRAUDULENT USE OF THE BLUE REPORT.

Despite its legal intricacies, plagiarism in the field of journalism is relatively simple and widely understood. There can be little doubt that an experienced reporter knows when he has engaged in it. (Tr. pp. 376-377). For purposes of this dispute, plagiarism can be defined as the fraudulent copying of a material and substantial portion of the literary product of another.

The fraud inherent in journalistic literary piracy can be perpetrated against the author, the newspaper, or the readers of the newspaper. It need not be against all. When it is, it amounts to plagiarism in its most complete and worst form.

The fraudulent conduct can be committed against an author when there is full disclosure and attribution, but no permission. (*Henry Holt & Co., Inc. v. Liggett & Myers Tobacco Co.*, 23 Fed. Supp. 302, opinion attached hereto as Appendix A.) It can be perpetrated against editors and readers when there is full and actual permission but no disclosure. In such cases, editors and readers, who have a right to expect and rely upon honest performance by reporters, are deceived into believing that what they read is the product of the reporters' original research and composition.

There is no reasonable doubt that Mrs. McLendon made fraudulent use of a substantial and material part of Mrs. Blue's report in her Prospect House article. It is undisputed that she did not have permission of the author. (Tr.

pp. 73, 77). It is equally clear that actual, not apparent, permission is required. (Tr. pp. 99, 130, 168, 176; and, *De Acosta v. Brown*, 146 Fed. 2d 408, 410-414, opinion attached hereto as Appendix B).

Mrs. McLendon, in compliance with the condition laid down by Mrs. Chatham, made no mention of the Blue report in her article, and gave no credit to her source. (Tr. p. 507; Co. Exh. 2, 3 and 4). Moreover, she did not inform any of her editors of her possession and use of the Blue report. (Tr. pp. 25, 297, 316, 325, 515-517).*

The total material taken from the Blue report represented over half of the wordage in the published article, and even more of the wordage submitted in Mrs. McLendon's hard copy, before editing changes. (Tr. pp. 10-11, 316). Of the narrative portion of the Blue report (Co. Exh. 4, pp. 7-15), Mrs. McLendon used at least 28% in her article. Indeed, when the pattern of Mrs. McLendon's use of the information in the report is understood as drawing only on the material that related most directly to the character and history of the house, as distinct from the personal history of the several owners, her proportion of usage increases substantially. For example, the large portions of Mrs. Blue's report that told of General Lingan's newspaper difficulties and ultimate death because of his dissent on government policies during the War of 1812, and of Templeman's bridge building and other business activi-

* It should be noted in connection with Mrs. McLendon's testimony at p. 515 that neither Judith Martin nor Elizabeth Shelton are her editors. Also this statement should be compared with Mrs. McLendon's testimony on page 452-3 which reads:

"Q. What did you do after you finished the interview?

A. Then I came back to the paper, and I took notes out of there, typed this, put it in an envelope, called her to say I was sending it out by cab."

"In the meantime she had to go out—she had cancelled this doctor's appointment while we were there because it was impossible for her to get there—and then she said, 'Don't send it right now'. So I don't know if I sent it later that day, or if I sent it the next morning. I know that I had it in an envelope, and had sealed it."

ties, for example, were of no interest to Mrs. McLendon in the preparation of her article, and so none of this material, which appeared on pages 8, 9, 10 and 11 of the report, was used. (Tr. pp. 524-527).

It is, of course, the Company's position that all of the material taken from the Blue report stands on the same footing in respect to the conduct for which Mrs. McLendon was discharged. Despite the Guild's attempt to separate and distinguish material surrounded by quotation marks, paraphrasing and historical facts in the public domain, which arguments will be dealt with later, it is our firm contention that, for the purposes of this dispute, all of the material used by Mrs. McLendon from the Blue report was fraudulently plagiarized, and must be considered together in reviewing her total conduct. (Tr. pp. 190-191; 223-224; 229-232; 298). Examination of judicial cases on this question reveals that even outside the context of employer-employee relationships, the applicable rules make no such differentiation with respect to the form or manner in which the pirated material is extracted and used. (*Holt v. Liggett & Myers, op. cit.*, Appendix A.; *Malkin v. Dubinsky*, 146 Fed. Supp. 111, opinion attached hereto as Appendix C; *Nikanov v. Simon & Schuster, Inc.*, 246 Fed. 2d 501, opinion attached hereto as Appendix D; (only similarity need be shown, *Smith v. Little, Brown & Co.*, 369 Fed. 2d 928, opinion attached hereto as Appendix E, and see lower court opinion, attached hereto as Appendix F.))

It should only be necessary to note here the additional fact that Mrs. McLendon did not intend to differentiate in her own mind the language copied verbatim, that paraphrased, and that lifted from the Blue report with such exactitude that it included Mrs. Blue's quotation marks. (Tr. pp. 297-298; 522-537). Moreover, in not a single instance did Mrs. McLendon place quotation marks around Blue report language where Mrs. Blue had not herself first placed them there. (Co. Exh. 3 and 4; Tr. p. 312).

Finally, although it seems unnecessary, it should be observed that even under the extreme position taken by the Guild, the actual "copying" which survives their unsupportable effort to eliminate other "copying" still amounts to the substantial and material portion of approximately 10% of the wordage in Mrs. McLendon's article.

**B. APPLICABLE WASHINGTON POST STANDARDS
USED IN JUDGING MRS. MCLENDON'S CONDUCT.**

It is readily apparent from the evidence in this record that the news department management of The Washington Post does not consider fraudulent use of a substantial and material part of another's literary product as proper or tolerable conduct. (Tr. pp. 24, 25, 91). Indeed, both Mr. Wiggins and Mr. Bradlee deem it gross misconduct. (Tr. pp. 21, 96-97). That this judgment is appropriate for major metropolitan newspapers is confirmed by the testimony of Dean Earl English, James Reston, and Marquis Childs. (Tr. pp. 181-182; 373-375; 380-381).

Whether the use of another's writings constitutes misconduct warranting discharge by the Post depends on several factors. (1) The amount and character of the material used must be examined to determine its substantiality and materiality (Tr. pp. 33; 121-125; 190; 223; 229-232; 260-265). (2) The knowledge and consent of the author must be determined (Tr. pp. 99-101, 130, 168, 176). (3) The nature of the disclosure of, and required by, the source of what is used must be ascertained. (Tr. pp. 63-70, 103-115, 121, 125, 130, 138-140, 261-265).

The ultimate question, of course, is whether there has been a material and substantial use of another's literary product in a dishonest, fraudulent manner—a passing off of another's work as that of your own. (Tr. p. 96). That such usage can occur without the knowledge of the management of The Washington Post is obvious (Tr. p. 146). That no such usage *with* the knowledge of the management has

occurred is demonstrated by all of the testimony and documentary evidence in this record.

A final determination of improper conduct can only be made by examining the *totality* of a particular writing in the framework of the three basic factors described by Wiggins and Bradlee. It cannot properly be made by a separate examination of each sentence or phrase in an article. It cannot be made without relating it directly to its actual source, and to the disclosure, in fact, required to prevent deception. And it is obvious that only confusion and meaningless information is elicited when a witness in this proceeding is asked a sentence or phrase at a time to make a judgment on the ultimate question with respect to that single sentence or phrase, or even paragraph, without all the facts bearing on the essential factors available to the witness. Such an approach completely avoids an essential evaluation and balancing of the total amount of material taken, its importance overall, the kind or absence of attribution or other disclosure made to editors and readers, and the question of author's consent.

What constitutes a "substantial and material" amount cannot be stated in precise weights and numbers. It is obviously a matter of reasonable judgment in each particular case. While it cannot be so small as to be *de minimus*, it does not have to be a large proportion of either the article or the document plagiarized. (Tr. pp. 142-145, 190-193, 223, 229-231, 373; and, also Appendices A through F, previously cited).

To avoid fraud, disclosure or attribution can take many different forms. It would not, for example, be necessary to cite each item of information or paraphrase of language from a document. Especially is this true where press release or similar documents distributed widely for specific re-use by the press or others are involved. While at times difficult, fraud and poor journalistic practice must be differentiated. An application of reasonable judgment readily

permits such distinctions to be made. An example of what would apparently * be appropriate to avoid fraudulent misconduct, as distinct from poor practice, is the disclosure made for the 14 series "White House Brides" article (Union Exh. 65-70; 103-106) which read:

"This is the first in a 14 part series on romance, courtship and marriage in the White House. Washington Post reporters Marie Smith and Louise Durbin drew fascinating stories and sidelights for this series from old chronicles, diaries and albums both in the National Archives and in the possession of descendants. They also talked with some of the White House brides who contributed lively reminiscences of their wedding day."

On the other hand, the total absence of disclosure of any kind here by Mrs. McLendon is patently a fraud both on her editors and her readers.

Although immaterial in this case, the final factor, consent of the author or owner of the document used, is easy to determine. Only actual permission suffices. Mrs. McLendon did not have, nor attempt to get, such consent, but even if she had her use here would have remained fraudulent as to her editors and readers, and a gross form of improper conduct.

* The statement is qualified in this manner because it was not deemed relevant or useful to examine in this record the essential facts behind the preparation of this series in the absence of claim or proof that the management of the news department had any knowledge of alleged plagiarism. In accordance with the commitment in the transcript (p. 430) attached as Appendix G is the bibliography used in the preparation of these articles. It is clear that the disclosure published with the first article (above) was more than adequate to prevent the conduct of these writers from paralleling that of Mrs. McLendon. The word "chronicles" clearly includes historical books within its definition scope and, notwithstanding that the book was published after the series of articles ran in the newspaper, the bibliography published in the book also represented the sources for the articles and generally disclosed in the item carried with the first article.

Without question, Mrs. McLendon's extensive use of Mrs. Blue's report, wholly without disclosure through credit or identification, represents an unmistakable violation of the Post's standards of plagiarism—a fraudulent use of a substantial and material portion of another's literary research and writing product. Or, put another way, Mrs. McLendon, without permission or attribution, passed off as her own a substantial and material part of the work of another.

C. THE EFFECT OF MRS. MCLENDON'S CONDUCT ON THE
EMPLOYER-EMPLOYEE RELATIONSHIP, AND ON THE
WASHINGTON POST.

Mrs. McLendon's massive deceit in the preparation of her Prospect House article has destroyed her ability to continue as an employee of the company. An editor has the ultimate responsibility to insure that his reporters give the newspaper's readers accurate news and information, honestly prepared and presented. On a large newspaper this responsibility can be carried out, as a practical matter, only through justified trust and confidence in the integrity of his staff. When that trust is broken, the editor has only one choice. He must discharge the writer who has perpetrated such a fraud upon him and the readers.

Professional dishonesty in an instance of this kind is intolerable. The trust and confidence cannot be restored. There is no practical substitute for it. The reporter is constantly in a position to repeat the misconduct without discovery, and no feasible supervision could guarantee otherwise.

Plagiarism by a reporter in the newspaper field can properly be likened to embezzlement by a bank employee. The delicate necessity for complete trust and confidence is parallel in each relationship. That this is not an ordinary form of misconduct for an employee is self-evident. The reporter's professional integrity, not some minor imperfection of personal character or competence less directly

related to his career, is involved. If a clerk in the business office were to plagiarize in a book review, or even a copy boy, not yet admitted to reporter's ranks and responsibilities, were to fraudulently use the literary product of another in an article for the newspaper, it would be serious and unquestionably good and sufficient cause for discharge, but not for gross misconduct. It is the status of Mrs. McLendon as a fully experienced, seasoned reporter that makes her fraudulent use gross misconduct. It is she who has implicitly pledged to her readers that her articles, unless otherwise disclosed, contain only the honest product of her own research and writing efforts. It is she, here, who has dishonestly violated this pledge.

And, it is The Washington Post which stands perilously exposed to the full impact of the breach of such pledge. The success of a major newspaper is dependent upon a number of factors, but integrity clearly stands at the top of such ingredients. Were The Washington Post to condone the kind of journalism inherent in Mrs. McLendon's conduct here, it would neither retain nor deserve the respect and confidence of its readers. (Tr. pp. 181-183, 375, 385-386). The high standards of journalism which it seeks to maintain are totally incompatible with plagiarism. Indeed, as the record discloses, the editors of the Post consider the use of another's literary product by reporters in a form and substance far different from and substantially less serious than that of the instant case, as unacceptable practice and conduct. It is unthinkable that The Washington Post should be made to abide by, and suffer the public disfavor and economic consequences of, a standard of journalism which condones the fraudulent conduct engaged in by Mrs. McLendon.

D. THE INADEQUACY OF THE GUILD'S DEFENSE.

In its efforts to protect Mrs. McLendon from the consequences of her actions, the Guild has sought to prove that this discharge was unjustified. In defense, it has

tried to show that Mrs. McLendon did not make fraudulent use of a substantial and material portion of the Blue report; that the Post news department management does not have a clear standard of plagiarism, or fraudulent use of another's literary product; and, that there were several mitigating circumstances related to Mrs. McLendon's performance which make her discharge unwarranted. It is the company's belief that each of the elements of the Guild's defense fails to achieve its purpose.

1. *Mrs. McLendon's use of the Blue report.*

The Guild made no effort to establish that if, in fact, Mrs. McLendon did commit plagiarism, or, in other words, use a substantial and material part of another's literary product fraudulently, that she would not have been properly discharged for gross misconduct. Rather, they chose, primarily, to attempt to show that what Mrs. McLendon did was substantially different, and less serious, than what the Company contends, and that it was no different from what is commonly done at The Washington Post and other publications.

There is no denial that Mrs. McLendon did copy substantially and materially from the Blue report. There is no denial that she did not have Mrs. Blue's permission. There is no denial that she did not identify the report as a source for her article. There is no denial that she did not disclose to her editors that she had and was copying from the document.

(a) *Quotation marks, paraphrasing and historical facts.*

The Guild contends that the portion of Mrs. Blue's report copied by Mrs. McLendon *together* with Mrs. Blue's quotation marks, that portion which she paraphrased, and that which consisted of straightforward statements of historical fact cannot be considered as copied. This is a specious contention. It is clear that "copying" where pla-

giarism is at issue cannot be so narrowly construed. (See Appendices C., p. 114; D., p. 504; and E., p. 928, headnote 3). It is not possible to evaluate properly Mrs. McLendon's conduct by an isolated, unreal examination of only her final product. Both documents must be taken together to ascertain the true nature and extent of the misrepresentations perpetrated by Mrs. McLendon.

A major misunderstanding produced by the technique of fragmented interrogation used by Guild counsel is the assumption that if what one copies includes quotation marks there can be no fraud, i.e., plagiarism, because the words *must* be those of someone other than the writer. This is a completely erroneous interpretation of what "using another's words as your own" means in the context of plagiarism. (Tr. 105-113, and see Appendix A., *op. cit.*). To illustrate, the conversational Macauley quote on page 3 of Mrs. McLendon's hard copy (Co. Exh. 3), which she took verbatim from the Blue report, can, in the literary sense only be the words of Captain Macauley. But this is obviously an unsound conclusion. Mrs. Blue put those words in her report, and Mrs. McLendon, without disclosure, took them and passed them off "as her own" (literary work) in her article. Indeed, Mrs. Oettinger thought Mrs. Chatham had supplied the information to Mrs. McLendon (Tr. pp. 327-328).

To illustrate the point further, suppose an author writes a novel exclusively in the style of quoted dialogue. Does each statement belong *only* to the fictional character who utters it? Can such reasoning exclude the obvious claim of the author that these are *his* words, *his* literary effort, and allow another writer to copy freely from this work, so long as he retains the original quotation marks, without fear of liability for fraudulent misappropriation? Clearly not. One who "copies" from the work of another—literally or by paraphrase—historical fact or fiction—quoted or unquoted words—commits plagiarism if his copying is sub-

stantial and material and without disclosure of actual source. Only in an author's suit would such fraud be cured, as to the author, by proof of actual permission.

The real question is where did Mrs. McLendon get the information and words used in her article, not what they look like independently of actual sources. Careful reading of both documents, and the pertinent testimony of Mrs. McLendon in the record, readily reveals the answer to this question, and it is totally immaterial for our purposes here that Mrs. McLendon's copying in some instances included quotation marks, historical facts, and in other cases was a loose rearrangement of the words in the Blue report. It is not what Mrs. McLendon's article *appeared* to be, but what it in fact *contained* from what *actual* sources, by which the fraud must be measured and judged.

It would be ironic indeed if a more, rather than less, precise verbatim copying should serve to diminish the fraudulent offense where there is no effort whatsoever to attribute material lifted with quotation marks to the actual source. Similarly, with respect to the happenstance that the material copied is historical fact. And, finally, it is clear that paraphrasing in the context of the total, massive use of the Blue report here, is copying just as fully as verbatim extraction in measuring the magnitude of the actual appropriation of another's literary work.

Moreover, it is evident from the testimony of the copy editor, Mrs. Oettinger, that none of the quotation marks, paraphrases, or historical facts in Mrs. McLendon's hard copy revealed to her that any particular document—let alone Mrs. Blue's report—was the undisclosed source of such material. (Tr. pp. 326-335, and see Bradlee testimony, p. 312). Mrs. Oettinger obviously believed the article to be entirely the product of Mrs. McLendon's own original research and writing. She could not possibly have discovered that this belief was false, and a result of the deliberate misrepresentation inherent in the manner with

which Mrs. McLendon prepared her article. The hard copy contains nothing which could have qualified to relieve Mrs. McLendon of the fraud she was perpetrating.

It is one thing for a reporter to take or paraphrase from one or more historical sources a few factual statements, and fail to credit his source. This would be poor or "sloppy practice", but probably not sufficient cause for discharge. It is quite another thing for Mrs. McLendon to have copied, from a single *non-historical* and *non-public* source, so extensively as she did (Tr. pp. 228-231, 373-375). And the extent of her copying, for purposes of this discharge proceeding, cannot be diminished by excluding from the scales that which she copied so faithfully as to happen to have included quotation marks; that which she copied, but not verbatim, and rather with a selective arrangement of words scarcely even qualifying as true paraphrasing; and, that which she copied which happens to represent historical fact. The basic facts remain—she copied a substantial amount of material portions of the report, without disclosure, and passed it off as the product of her own literary efforts.

(b) *Permission.*

The effort to establish that Mrs. McLendon thought Mrs. Chatham owned the Blue report and had authority to give her permission to use it is wholly without significance. Even had this been true, the important fact is that the *actual use* of the report by Mrs. McLendon was fraudulently plagiaristic as to her editors and readers. That it was not true, and the Company believes that Mrs. McLendon must have sensed this—because she had previously read the New York Times article by Myra MacPherson; because she had to persuade Mrs. Chatham to give the report to her; because Mrs. Chatham laid down the unusual and suspect condition that her possession and use of the report must not be revealed; and, because Mrs. Blue's name appeared on the report—only serves to make her conduct

all the more reprehensible, her plagiarism all the more complete.

(c) *Time pressure.*

As a mitigating circumstance and explanation for Mrs. McLendon's use of the report, the Guild contends that she was under unusual time pressure during the week the article was written. The simple answer to this is that, even if true, it would not justify the use made of the report. Mrs. McLendon could have refused to accept Mrs. Chatham's injunction of no identification of the report. She could have decided not to use it. At the least, she could have informed her editors that she was using it under the condition of secrecy imposed by Mrs. Chatham.

That reporters always operate under time pressure and deadlines is common knowledge. It is the nature of their work. (Tr. pp. 189-190, 365). This can excuse an occasional inaccuracy or even poor article. It cannot justify fraud.

But more important, an examination of Mrs. McLendon's workload for the week in question does not support the contention that she was unduly pressed for time. (Tr. pp. 436-465). She wrote five stories, at least one of which she had done considerable work on in previous days. An examination of the four stories (Union Exh. 106 through 109), together with the Prospect House article, indicates no special strain for an experienced reporter in a five-day work week of thirty-seven and one-half hours.

(d) *Absence of Company instructions on plagiarism.*

The Company has issued no office rules forbidding an undisclosed, fraudulent use of substantial and material portions of another's work. It has not attempted to define plagiarism for its reporters. Neither has it expressly forbidden or defined numberless other forms of serious mis-

conduct. It has believed that to do so would be not only unnecessary but an affront to the maturity, intelligence and self-respect of its employees. (Tr. p. 141; see also Reston, Tr. p. 376).

For the Guild to suggest that the Company should have issued rules and guidelines on plagiarism, and that its failure to do so relieves Mrs. McLendon of the consequences of her actions, is utterly without reasonable foundation. It is obvious that this is not the purpose or function of style books. In the long history of Anglo-Saxon jurisprudence no court has ever attempted a precise and all-inclusive definition of fraud. A recognition of the limitless ingenuity of those inclined to this form of dishonesty has prevented such an effort. It is evident that any attempt to define and expressly delimit plagiarism would be equally unwise and unsuccessful. It is respectfully submitted that a professional writer knows when he commits this kind of fraudulent act, without consulting a rulebook.

2. Alleged comparability of Blue report to press releases, fact sheets, brochures and handouts.

In view of many of the exhibits submitted by the Guild, it is evident that it considers the Blue report as comparable to a press release, brochure or similar handout. Further, it is clear that the Guild believes it is common and proper practice for such materials to be copied by reporters.

It is respectfully submitted that neither proposition is true. A comparison of the Blue report with all of the exhibits in this category introduced by the Guild, and the Company Exhibit 11, on Hillwood, the home of Marjorie Merriweather Post, readily reveals the many and significant differences which exist. Indeed, even the testimony of the Guild's witness, Frances Lewine, confirmed this. (Tr. pp. 407-414). In addition, it seems necessary only to mention briefly the totally different functions and purposes of

press release material. Such documents are not only intended for use by newspapers, but are often substitutes for live interviews. Moreover, the realistic necessity, in the fraud sense, to credit or cite such documents as sources would only rarely occur.

That it is not common or proper practice for even press release type material to be used by reporters on major metropolitan newspaper staffs in a manner amounting to plagiarism is equally clear from the testimony of Bradlee, Wiggins, English, Reston and Childes, and we respectfully submit, even the testimony of the Guild's witnesses, Lewine and Shelton.

The attempt to justify Mrs. McLendon's conduct by this evidence and argument fails for both reasons. First, evidence of the use of press release material has no relevance to this dispute, because the Blue report is *not* that kind of document. (Tr. p. 237). Second, even press release material could be used in such manner and to such an extent as to be fraudulent and plagiarism and, if known to the management of a newspaper like The Washington Post, would result in the discharge of the responsible reporter. (Tr. p. 281). And, finally, not a single exhibit represents a use at all as extensive or comparable to the use made of the Blue report.

3. Alleged similar conduct by other journalists.

In its effort to prove that Mrs. McLendon's use of the Blue report was not gross misconduct, or even sufficient cause for discharge, the Guild presented instances of other articles containing uncredited material taken from other writers. In order properly to assess the relevance and persuasiveness of such evidence a number of factors must be carefully considered.

In those relatively few cases where the exhibits were from The Washington Post no evidence was offered, or

claim made, that the news department managers had knowledge of such unattributed copying as the articles contained. Moreover, in no such article was the copying of the kind and magnitude as occurred in this case. For none of these exhibits was there offered any background evidence that might well be necessary to a full and reliable evaluation of its true relevance and significance.

The negligible probative quality of these exhibits can be seen by brief references to several. In addition, such examination of the exhibits reveals the strained character of the effort to distort and confuse the factual issues involved in this dispute.

An excellent example is Union Exhibit 72, Maxine Cheshire's September 8, 1962 article on Mrs. John F. Kennedy's White House restoration program. In a story at least as long as the Prospect House article the Guild found four instances of copying without proper attribution, and implied the performance of the writer was comparable to that of Mrs. McLendon. The first item marked in the exhibit was a two-sentence quote from a writing by Henry F. duPont. It is directly attributed to duPont, and properly surrounded by quotation marks. It lacked the identification of the particular writing from which it was taken.

The second was a quoted single sentence from a letter of Thomas Jefferson to duPont de Nemours, which presumably—as indicated by Union Exhibit 73—was taken from a 515 page book, "A Book About American Politics," by George Simpson, without crediting this source. The third is a quoted statement that a reading of the preceding two paragraphs in the article makes absolutely clear derives from Mrs. Cheshire's interview of Mrs. John F. Kennedy. And, the final item is an interview quote precisely the same as the third.

To compare this article with Mrs. McLendon's serves only to increase the perception of the major differences in

the writings. There is no attempt by Mrs. Cheshire to pass off another's work as her own; the copied material is adequately, if not perfectly, attributed to prevent any claim of fraud against Mrs. Cheshire; and, the amount of material copied, even if it were taken in the same manner as Mrs. McLendon took her material from the Blue report is *de minimus* by contrast.

Union Exhibit 74, which contains only a portion of still another article by Mrs. Cheshire in the same series, has two partial sentences quoted from an 1817 letter to President Monroe from his agent in Le Havre, not cited to Mrs. Cheshire's source for the letter, and a short phrase concerning the Green Room of the White House, also not credited to source. Again, comparison only enhances the magnitude of Mrs. McLendon's offense. (Union Exh. 76-81).

Examination of the Women's Wear Daily articles (Union Exh. 14-19 and 84-85) produces the same result. This is a news service purchased for use by The Washington Post and is regularly credited, as are the AP, UPI, Reuters, Chicago Daily News Service, The London Observer, The Manchester Guardian, The London Sunday Times, and countless other purchased sources of news and feature material. On occasion, the credit slug or line is inadvertently omitted in the composing room. While this accidental omission does not excuse the resulting poor practice, it is clearly distinguishable from the case here at issue. Moreover, in all but one of the articles introduced, identification of Women's Wear Daily was adequate, even if imperfect. And even in this one instance (Exh. 84 and 85) it is clear that the Women's Wear Daily item was the source of only a slight amount of the material in the Post article.

All of the other exhibits introduced by the Guild are similarly distinguishable and unpersuasive in respect to the proper evaluation of Mrs. McLendon's conduct for the purposes of this arbitration. They only serve to divert

attention, distort a proper understanding and confuse the basic issues. Not one of them comes close to standing in a factual position comparable to the facts of this case. This can perhaps best be understood by recalling the Guild's efforts to introduce the excerpt from Mr. Wiggins' speech to the Council of Churches. As the arbitrator quickly perceived and noted, that newspaper item had *no* bearing on this case for the very simple reason that it was fully identified in a note preceding the article as exactly what it was—excerpts from Mr. Wiggins' speech. Wholly apart from the irrelevant question whether Mr. Wiggins followed proper literary practices in preparing the speech—a fact the Company was fully prepared to establish by calling Mr. Wiggins to testify—it was readily apparent to the arbitrator (Tr. p. 250), and should have been to the Guild, that the newspaper itself had fully disclosed its source and could not possibly be found to have acted plagiaristically in publishing the excerpt. We respectfully submit, that for sound reasons which differ from exhibit to exhibit, each Union item of evidence is similarly irrelevant and immaterial to the issues in this dispute.

III. CONCLUSION

Mrs. McLendon copied from a single, undisclosed, literary source for the major portion of her article on Prospect House. These facts are undisputed, even though the Guild has attempted by a strange process of literary alchemy and unsound reasoning to disqualify from consideration here substantial segments of what Mrs. McLendon, in fact, did copy from the Blue report. Had there been the slightest attempt at disclosure by Mrs. McLendon to properly and accurately identify her source, these arguments might have had some material significance. But there was none.

In addition, Mrs. McLendon did not have the permission of the report's author, who devoted many months to its

preparation, and the evidence, we believe, supports the finding that Mrs. McLendon knew or suspected the true facts about Mrs. Blue's report and its intended purposes. She made no effort to get permission, or to examine why Mrs. Chatham should make the strange request that the report not be identified as a source. In complying with Mrs. Chatham's request, Mrs. McLendon clearly violated her obligation of loyalty and honesty to her employer, in favor of her pledge to Mrs. Chatham, and thus enhanced the magnitude of the fraud she perpetrated in this act of plagiarism.

There is no evidence in this record which alters or mitigates the serious degree and character of Mrs. McLendon's conduct. By any standard, legal or journalistic, and certainly by the standards of The Washington Post, she has perpetrated a grievous fraud, committed plagiarism, and engaged in gross misconduct.

We respectfully submit that on all the facts and the appropriate provisions of the applicable labor agreement, her discharge must be sustained.

/s/ GERALD W. SIEGEL
Gerald W. Siegel

/s/ LAWRENCE W. KENNELLY
Lawrence W. Kennelly
Counsel for
The Washington Post

March 11, 1968

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/s/ GERALD W. SIEGEL
Gerald W. Siegel

/s/ LAWRENCE W. KENNELLY
Lawrence W. Kennelly
Counsel for
The Washington Post

March 11, 1968

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1714-68

WASHINGTON-BALTIMORE NEWSPAPER GUILD, LOCAL 35,
Plaintiff

v.

THE WASHINGTON POST COMPANY, *Defendant*

Amended Complaint

(To Modify and/or Vacate Arbitration Award)

1. Plaintiff is a labor organization with main offices in Washington, D. C. and defendant is a company with main offices in Washington, D. C.

2. On December 15, 1966, plaintiff and defendant entered into a written collective bargaining agreement providing for a term from December 1, 1966 to November 30, 1969.

3. Said agreement provides, in Article VI thereof, that "No employee shall be discharged except for good and sufficient cause" and that if, upon conference, the parties are unable to agree as to the proper disposition of a discharge case, the matter may be referred by plaintiff to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association.

4. On October 19, 1967, Mrs. Winzola McLendon, an employee of defendant within the unit covered by the said agreement, was discharged for what defendant described as "gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism."

5. The parties conferred and were unable to agree upon the proper disposition of this discharge, and thereafter, pursuant to the relevant provisions of the agreement and the Voluntary Labor Arbitration Rules of the American Arbitration Association, plaintiff moved to submit to arbitration "the question of the discharge of Winzola Mc-

Lendon for gross misconduct." The parties selected and appointed Emanuel Stein as arbitrator of the dispute.

6. On April 12, 1968, said arbitrator made his award in writing and after duly acknowledging it delivered the same to the parties herein. A copy of said award is attached hereto, marked Exhibit A, and made a part hereof.

7. The award of the arbitrator is improper and unlawful in that:

(a) In sustaining the discharge on grounds other than those on which the company based the discharge, the award exceeded the authority of the arbitrator.

(b) The arbitrator refused to hear or consider certain material evidence.

(c) The award is arbitrary and capricious.

8. Following the award, plaintiff discovered new evidence, attached hereto as Exhibit B, which has a direct and substantial bearing on a central issue of the arbitration.

WHEREFORE, plaintiff prays:

1. That, the award be affirmed insofar as it finds that Mrs. McLendon was not guilty of gross misconduct; that it be vacated insofar as it exceeds that issue and upholds her discharge on grounds of "good and sufficient cause;" and that Mrs. McLendon be reinstated to her employment with back pay and all employment rights unimpaired.

2. In the alternative, that the award be vacated in its entirety and that the discharge be arbitrated de novo before a new arbitrator, with instructions to receive and consider the newly discovered evidence, and to receive and consider the material evidence previously rejected.

3. And for such other and further relief as may seem just and proper.

WASHINGTON-BALTIMORE NEWSPAPER GUILD

By
Seymour J. Spelman, Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Answer

[To Amended Complaint]

Defendant, The Washington Post Company, by its attorneys, Royall, Koegel & Wells, in answer to the amended complaint herein alleges as follows:

FIRST DEFENSE

1. Denies each and every allegation contained in paragraphs 2 and 3 of the complaint, except admits that it entered into a written collective bargaining agreement providing for a term from December 1, 1966, to November 30, 1969, and refers to said agreement, a copy of which is attached to the original answer and is incorporated herein as Exhibit A, for the full and accurate content thereof.

2. Denies the allegations and each of them contained in paragraphs 4 and 5 of the complaint, except admits that Mrs. McLendon, then an employee of defendant within the unit covered by the said agreement, was discharged on October 19, 1967; that a conference on October 19, 1967, pursuant to the provisions of Article VI(3) of the collective bargaining agreement failed to resolve the grievance; that plaintiff submitted a demand for arbitration to the American Arbitration Association by letter dated October 20, 1967; and that Emanuel Stein was selected and appointed arbitrator of the dispute. Defendant further states as follows: on the day of the discharge, October 19, 1967, the plaintiff, through its grievance committee, presented the following grievance;

“The Guild demanded the employe’s immediate reinstatement because the firing was precipitate and

without grounds under the contract, which provides: 'No employe shall be discharged except for good and sufficient cause.''' (Exhibit E attached hereto and incorporated herein.)

Said conference of October 19th having failed to resolve the grievance pursuant to the provisions of Article VI(3) of the collective bargaining agreement, the plaintiff submitted the following day, October 20, 1967, a demand for arbitration to the American Arbitration Association as follows:

"Under the terms of Article XVII and Article VI paragraph 3 of the Washington Post-Guild contract, the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a womens page reporter for 'gross misconduct' to arbitration.

"The alleged misconduct involves an unproved charge of plagiarism against Mrs. McLendon. The Guild maintains that the discharge was not for good and sufficient cause." (Exhibit C attached to original answer is incorporated herein.)

Thereafter, pursuant to request of plaintiff made October 19, 1967, plaintiff confirmed the grounds for discharge to Mrs. McLendon as follows:

"Pursuant to a request made on your behalf by Mr. Ira Lechner, attorney for the Washington-Baltimore Newspaper Guild, this is to advise you that you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism." (Exhibit B attached to original answer is incorporated herein.)

At the arbitration hearing, the arbitrator requested from the parties a statement of the issue presented. The defendant stated the issue as follows:

"The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement." (Defendant's Statement of Material Fact in Support of Motion for Summary Judgment, Item 3, p. 2.)

Plaintiff did not object to this statement of the issue presented and made no counterstatement. In its post arbitration brief, plaintiff argued that discharge was too severe a penalty under the contract and that the arbitrator should therefore conclude McLendon was not discharged for good and sufficient cause and should be reinstated because she was improperly discharged. Article XVII of the collective bargaining agreement pursuant to which the Union moved this grievance to arbitration makes mandatory the responsibility of the arbitrator as follows:

"In a dispute arising from a discharge of an employee, the Authority of the Arbitrator *shall* be that specified in Article VI of this Agreement." (Italics supplied; Defendant's Statement of Material Fact in Support of Motion for Summary Judgment, Item 13, page 9, last sentence.)

Article VI(3) of the contract requires an arbitrator to determine, in the case of a discharge, whether the discharge was not for good and sufficient cause. (Defendant's Statement of Material Fact in Support of Motion for Summary Judgment, Item 13, page 6.)

3. Defendant admits the allegations contained in paragraph 6 of the complaint and states that the arbitrator's award reads as follows:

"The discharge of Mrs. Winzola McLendon was not for willful neglect of duty or gross misconduct, but it was for good and sufficient cause."

Defendant further states that the award was accompanied by an opinion of the arbitrator. A copy of said award and opinion is attached to original answer and incorporated herein as Exhibit D.

4. Defendant denies each and every allegation contained in paragraph 7 of the complaint, as amended.

5. Defendant denies each and every allegation contained in paragraph 8 of the complaint, as amended.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

1. This is an action by plaintiff union to compel a second arbitration of a controversy over a discharge that has once been arbitrated. The agreement under which the arbitration proceeding was held is one covered by Section 301(a) of the Labor Management Relations Act, 29 U.S.C., § 185(a). Plaintiff's present application to vacate the award is governed by federal law pursuant to Section 301(a).

2. In Articles XVII and VI(3) of the collective bargaining agreement (Exhibit A attached hereto) the parties mutually agreed to submit this kind of controversy to arbitration and to abide by the award of the arbitrator.

3. Said Article VI(3) and Article X of the collective bargaining agreement precisely define the rights and obligations of the parties in the respective situations in which (a) a discharge is not for good and sufficient cause, (b) a discharge is for good and sufficient cause but not for willful neglect or gross misconduct, and (c) a discharge is also justified for willful neglect or gross misconduct. If the parties do not agree upon the disposition of a discharge in a conference grievance procedure, the matter may be referred to an arbitrator, in which case the parties by

mutual agreement have expressly spelled out in Article VI(3) the arbitrator's duties and authority to definitively decide the justification for and nature of the discharge, to wit:

A. If the arbitrator renders an award that the discharge was not for good and sufficient cause, the employer shall be obligated either

(a) to restore the discharged employee to his position with full pay for the period from the date of discharge to the date of reinstatement and with service record unimpaired, or

(b) at the option of the defendant to pay the discharged employee (i) any sums due him at the time as severance pay under Article X of the agreement and as payment in lieu of notice under paragraph (3) of Article VI, and (ii) a dismissal indemnity computed in accordance with a schedule set out thereafter in said Article VI(3).

Under said Article VI(3) if the arbitrator renders an award that the discharge was not for good and sufficient cause, it necessarily follows that the discharge was not for willful neglect of duty or gross misconduct.

B. If under Article VI the arbitrator passes the threshold question by deciding that the discharge was for good and sufficient cause, he is then required if the discharge was for willful neglect of duty or gross misconduct to determine whether the discharge was or was not sustainable on this more serious level. Said Article VI provides that if the arbitrator renders an award holding only that the discharge was not for willful neglect of duty or gross misconduct, the employer is obligated only to pay the discharged employee the sums due him at the time as severance pay under Article X of the agreement and as payment in lieu of notice under paragraph (3) of Article VI

as an employee discharged for good and sufficient cause.

C. Pursuant to Articles VI(3) and X, if the arbitrator concludes that the discharge was for willful neglect of duty or gross misconduct, the employer is not required to pay the employee severance or in lieu of notice pay in connection with the discharge.

4. When plaintiff and defendant were unable to agree as to the proper disposition of the McLendon grievance, the plaintiff announced it would submit the grievance to arbitration as arising under Articles VI(3) and XVII of the collective bargaining agreement for the resolution of the issues upon which grievant's and defendant's rights and liabilities depended. Plaintiff union in its demand for arbitration stated the issue presented as arising under said Articles VI(3) and XVII and to be whether Mrs. McLendon was discharged for good and sufficient cause and whether she was discharged for gross misconduct. At no time in the grievance conference or otherwise did plaintiff request or did defendant agree to any limitations or restrictions upon the authority of jurisdiction of the arbitrator under the contract. The issues submitted for arbitration by plaintiff embraced each and every claim or grievance arising out of the discharge and plaintiff union did not reserve any portion of such claim or grievance.

5. The arbitration hearing took three days to complete, and the transcript covered 555 pages. In addition exhibits introduced exceeded 120. Emanuel Stein, an arbitrator of wide experience and excellent reputation, was selected by the parties from a panel submitted by the American Arbitration Association. Though not a lawyer, he did not act directly or indirectly under any mistake of law in rendering his decision and award and did not refuse to receive or hear any relevant and material evidence offered by the plaintiff. The discharge issue was properly submitted by plaintiff and defendant and the arbitrator,

acting clearly within the jurisdiction conferred by the applicable agreement, adjudicated this issue in a precisely clear, definite and unambiguous award, to wit: Mrs. McLendon was discharged for good and sufficient cause but not for willful neglect of duty or gross misconduct.

6. Plaintiff has had its arbitration and cannot have another simply because it is dissatisfied with the results of the arbitration. Plaintiff's claim has been previously and properly adjudicated and determined and the decision is final and binding upon the parties. Further arbitration concerning the discharge of Mrs. McLendon is barred.

FOURTH DEFENSE

Immediately following the award plaintiff union undertook negotiations with defendant for the proper application of the award to the service record of Mrs. McLendon. Agreement was reached after conflicting positions had been taken with respect to the computation of her service time. Plaintiff union and defendant agreed upon the amount of severance which was then paid to Mrs. McLendon and the checks for such severance have been cashed by Mrs. McLendon. Plaintiff is precluded from contesting the award because it was accepted and complied with by plaintiff union, Mrs. McLendon and defendant, and defendant has fully discharged all its obligations thereunder pursuant to a settlement agreement.

FIFTH DEFENSE

1. The material alleged as being newly discovered evidence (paragraph 8 of amended complaint) has been available to all employees and to the plaintiff since its issuance May 24, 1969, and the allegation is only another, and more belated, excuse to entangle the court in an examination of the merits of a discharge case already decided by an arbitrator whose award is final and binding

by agreement of the parties. The allegedly newly discovered evidence is not evidence at all with any bearing or relevance to a discharge that took place eight months earlier. The arbitrator knew that no such memorandum was in writing at the time of the discharge. The memorandum referred to is simply what the defendant put in the style book for reporters.

2. The amended prayer for relief based on the allegedly newly discovered evidence has nothing to do with the alleged new evidence and is contradictory in requesting that this court should reinstate an employee notwithstanding the decision of the arbitrator that the employee was discharged for just cause. The plaintiff's request for relief does show once again that it is seeking to have this court review the merits of an arbitrator's award, and to do so *de novo* and on alleged new evidence, for it asks this court to reinstate the employee for the reason that there was not good and sufficient cause to discharge her under the contract, just as it asked the arbitrator to do the same thing.

3. The amendments to the complaint are contrary to well-settled principles of Federal labor arbitration law. They do not remedy in any way the basic defects in the original complaint which failed to state a cause of action upon which the relief requested can be granted. Coming after the issues had been joined and set for hearing on the Motion and Cross-Motion for Summary Judgment, the amendments to the complaint have resulted in a delay which is prejudicial to a speedy resolution of a matter relating to the finality of a labor arbitration. National policy favors the speedy conclusion of a labor dispute through binding arbitration.

WHEREFORE, having fully answered the amended complaint by the material contained herein, defendant demands judgment dismissing the complaint, together with its costs and disbursements, and does hereby renew, re-

affirm and continue its Motion for Summary Judgment of October 29, 1968.

ROYALL, KOEGEL & WELLS

By /s/ STUART ROTHMAN

A Member of the Firm

Attorneys for Defendant

1730 K Street, N. W.

Washington, D. C. 20006

338-7760

/s/ GERALD W. SIEGEL

Gerald W. Siegel, Counsel

The Washington Post

Company

Exhibit E

Post Unit Chairman's Report No. 4

October 23, 1967

Last Thursday a by-lined reporter with 14 years' standing was fired. The employee had been foresighted enough to outline the case to us when she saw the ax about to fall, so the Guild was able to meet immediately with the Company to protest.

Representing the Company were its counsel, Gerald Siegel, and its assistant business manager for labor relations, Lawrence Kennelly. Representing the Guild were Administrative Officer Brian Flores, Local Representative Michael Stuart and myself. The Guild demanded the employee's immediate reinstatement because the firing was precipitated and without grounds under the contract, which provides: "No employee shall be discharged except for good and sufficient cause."

The Company refused to reinstate her and claimed the firing was for good cause—"gross misconduct." They

showed us their key evidence, which failed to dispel our first impression that the discharge was groundless.

The Guild and the Company agreed to move immediately to select an impartial arbitrator so that the matter would be settled as soon as possible. When the Guild and the Company reach an impasse, they agree on an arbitrator—a sort of rent-a-judge—who hears the case and hands down a binding ruling.

The Guild does not go this far unless it feels it has a case that is not only strong but also right.

So far this year the Company has forced us into arbitration in several cases, of which it has not won a single one. If you and I had a batting average like that we would look for another line of work but executives expect each other to make mistakes. They demand perfection only from subordinates.

I am confident we will win the case.

—J. V. REISTRUP
Unit Chairman

opeiu 2 afl-cio

**Excerpts From Agreement of December 15, 1966 Between
Appellant and Appellee**

ARTICLE VI—SECURITY

* * * * *

(3) No employee shall be discharged except for good and sufficient cause. Discharge of new employees with less than six (6) months employment shall not be subject to review by the Standing Committee. Two weeks' notice in advance of discharge shall be given to employees with six (6) months or more of continuous employment except in cases of discharge for willful neglect of duty or gross misconduct. Any such employee upon receipt of notice of discharge, or upon discharge where no notice is given, may apply to the Standing Committee so that the Committee may confer with The Post in the case. If, upon conference, a discharge is found by mutual agreement not to have been based on good and sufficient cause, The Post shall restore the discharged employee to his position, with full pay for the period from the date of discharge to date of reinstatement and with service record unimpaired.

Conferences regarding any discharge shall proceed with due diligence and shall be concluded within thirty (30) days after the notice of discharge or after discharge where no notice is given. If, upon conference, The Post and the Guild are unable to agree as to the proper disposition of the case within thirty (30) days after notice of discharge, or after discharge where no notice is given, the matter may be referred by the Guild to arbitration under Paragraph (2) of Article XVII of this Agreement within fifteen (15) days after the end of such thirty (30) day period. If the Arbitrator renders an award that the discharge was not for good and sufficient cause, The Post shall be obligated either (a) to restore the discharged employee to his position with full pay for the period from the date of discharge to the date of reinstatement and with service record unimpaired, or (b) at the option of The Post to pay the discharged employee

any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI and a dismissal indemnity computed in accordance with the following schedule:

(Schedule omitted)

The dismissal indemnity shall be computed on the basis of the highest regular weekly salary received by the employee during the two (2) years next preceding the termination of his service. If the Arbitrator renders an award holding only that the discharge was not for willful neglect of duty or gross misconduct, The Post shall be obligated to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI.

* * * * *

ARTICLE XVII—GRIEVANCE PROCEDURE

* * * * *

(2) Any matter arising from the application of this Agreement, which the Guild and The Post have not been able after reasonable effort to settle, shall be submitted to arbitration, upon notice of either party to the other, under the Voluntary Labor Arbitration Rules then obtaining of the American Arbitration Association. Expenses of arbitration which are jointly incurred shall be shared equally by the parties. The parties agree to abide by the award subject to such rules and regulations as any Federal agency having jurisdiction may impose. In a dispute arising from a discharge of an employee, the Authority of the Arbitrator shall be that specified in Article VI of this Agreement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Motion for Summary Judgment

COMES NOW the defendant THE WASHINGTON POST COMPANY, by its attorneys, Royall, Koegel, Rogers & Wells and Gerald W. Siegel, Counsel for The Washington Post Company, and pursuant to Rule 56 of the Federal Rules of Civil Procedure moves this Court for summary judgment dismissing the action on the ground that there is no genuine issue as to any material fact herein and that the defendant is entitled to judgment as matter of law and for such other and further and different relief as the Court may deem just and proper.

This motion is based upon the pleadings which are on file in this Court, and the affidavit of Lawrence W. Kennelly with the annexed exhibits 1-9 attached hereto.

ROYALL, KOEGEL, ROGERS & WELLS

By /s/ STUART ROTHMAN
A Member of the Firm

1730 K Street, N. W.
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/s/ GERALD W. SIEGEL
Gerald W. Siegel
Counsel for The Washington
Post Company
1515 L Street,
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Attorneys for Defendant

October 29, 1968

Notice of Motion

To: SEYMOUR J. SPELMAN, Esq.
SPELMAN, LECHNER & WAGNER
902 Warner Building
Washington, D. C.

Please take notice that the points to be submitted in support of the foregoing motion and the authorities and statement of material facts intended to be used are attached hereto. The rules of the above-entitled Court require that if you oppose the granting of the above motion you shall, within ten days from the date of service of a copy of this motion upon you, or such further time as the said Court may grant, or, as the parties to this suit may agree upon, file in reply with the Clerk of said Court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for defendant.

ROYALL, KOEGEL, ROGERS & WELLS

By /s/ STUART ROTHMAN
A Member of the Firm

/s/ GERALD W. SIEGEL
Gerald W. Siegel
Counsel for The Washington
Post Company

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Memorandum of Points and Authorities in Support of Defendant the Washington Post Company's Motion for Summary Judgment

STATEMENT

This is an action to compel a second arbitration of a discharge grievance once fully arbitrated. The plaintiff requests this court to vacate the arbitrator's award and order a second arbitration "de novo" before a different arbitrator.

An arbitration was held pursuant to the voluntary arbitration rules of the American Arbitration Association as required by the collective bargaining agreement (Ans., Ex. A) between the parties. The arbitrator made the following Award:

"The discharge of Mrs. Winzola McLendon was not for willful neglect of duty or gross misconduct, but it was for good and sufficient cause."

The Award was accompanied by the arbitrator's 28-page opinion (Ans., Ex. D) in which he stated the issue presented as follows:

"The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement." (Arb. Op., p. 1)*

The arbitrator's opinion specifically set forth his understanding of his duties and scope of authority under Ar-

* The issue was so stated by the Company in its opening statement. The Union made no opening statement at the hearing, but in its request for arbitration to the American Arbitration Association by letter dated October 20, 1967, plaintiff stated the issue arose under Article VI(3) and Article XVII of the collective bargaining agreement and involved the "question of the discharge of Winzola McLendon for gross misconduct" and further asserted that the Guild maintained "the discharge was not for good and sufficient cause."

The arbitrator stated the Company's position as follows:

"In urging that the dismissal of Mrs. McLendon for gross misconduct be sustained, the Publisher describes the issue a basically one of plagiarism—the fraudulent copying of a material and substantial portion of the literary product of another'." (Publisher's Brief, 9) * * * (Arb. Op., p. 9)

The arbitrator stated the Union's position as follows:

"Finally, the Guild argues that, in view of Mrs. McLendon's prior record and her length of service with The Post, discharge was too great a penalty to constitute 'good and sufficient cause,' even assuming that she had 'violated good practice in her treatment of the Blue report in writing the Prospect House story. * * *' (Ibid., 15)" (Arb. Op., p. 11)

ticle VI(3) of the collective bargaining agreement. (Arb. Op., pp. 1 and 2)

Article VI(3) of the contract (Ans., Ex. A, pp. 16 and 17) empowers and required the arbitrator to decide (1) whether or not there was good and sufficient cause to discharge the employee; and (2) whether or not the Company was justified in finding the employee guilty of a higher degree of culpability, namely, gross misconduct.

After a careful and comprehensive review and analysis of the extensive evidence offered by both parties, the arbitrator concluded (Arb. Op., p. 25):

"On the basis of the record as a whole, I am of the opinion that Mrs. McLendon acted very improperly in the character and extent of her utilization of the Blue report, in her failure to make attribution in the article itself, in her failure to secure permission to use the report from the persons authorized to grant such permission, and in her failure to inform her editors of the circumstances under which she secured the report as well as the conditions attached by Mrs. Chatham to its use."

The arbitrator further concluded the use of the Blue manuscript exceeded permissible limits (Arb. Op., p. 26), that grievant appropriated substantial portions of another's literary talent (Arb. Op., pp. 26 and 28) which did not conform to approved practice of large metropolitan papers (Arb. Op., p. 26) and which was not condoned (Arb. Op., p. 26). Concluding in the last paragraph of page 22 of his opinion that Mrs. McLendon's appropriation of the Blue report exceeded permissible limits and did not conform to approved practice, the arbitrator passed on to the question of whether the grievant was also guilty of gross misconduct. Finding that pressure of time would excuse the grievant from "gross misconduct," the arbitrator concluded:

"Under the circumstances, it is my opinion that the Publisher was justified in dismissing Mrs. McLendon for 'good and sufficient cause' but not for 'willful neglect of duty or gross misconduct.'"

After the arbitration Award, the Union, the grievant and the Company met to determine the amount of separation pay due grievant under the contract by reason of the award. There was disagreement over the length of grievant's applicable service and the computation of separation pay based on it. The Union and grievant disputed the Company's computations and both sides then accepted a compromise settlement on May 6, 1968. The money was paid to the grievant in discharge of the obligations under the Award. This was done with the knowledge and approval of the Union. (Kennelly Aff., para. 12) The question whether grievant was entitled to a "dismissal indemnity" under Article VI(3) was not involved because the arbitration Award, holding the discharge justified by good and sufficient cause, precluded such payment.

On July 11, 1968, the Union filed the complaint herein petitioning this court to vacate the arbitrator's Award and to assign the same arbitration and the same grievance to a different arbitrator on the alleged grounds that (1) the arbitrator exceeded his authority, (2) the arbitrator made a mistake of law, (3) the arbitrator refused to receive material evidence, and (4) the arbitrator acted arbitrarily, capriciously and irrationally.

The parties accepted and have implemented the Award. Having reached an accord and satisfaction the defendant is completely released from further obligation to the grievant by reason of the Award or the grievance. There is clearly no material question of fact in dispute between the parties. The arbitration record shows that (1) the arbitrator did not exceed his authority; (2) he did not make an error of law; (3) he did not refuse to receive material

and relevant evidence; and (4) he did not act arbitrarily, capriciously and irrationally.

In fact, a more skillful, proper, comprehensive and fair arbitratve disposition of a discharge case would be hard to find.

ARGUMENT

POINT 1.

THE UNION, THE GRIEVANT AND THE COMPANY HAVE REACHED AN ACCORD AND SATISFACTION OF THE COMPANY'S OBLIGATION UNDER THE AWARD AND THE COLLECTIVE BARGAINING AGREEMENT.

After the arbitrator rendered his Award, the Union and the Company met, with the grievant present, for the purpose of computing the amount of separation pay due by reason of the Award and as required by the collective bargaining agreement. There was a dispute over the amount because there was a disagreement over the length of grievant's service record. The matter was resolved by compromise. The parties thus reached a full and complete agreement as to the amount due on May 6, 1968. (Kennelly Aff., para. 12) The grievant has received and accepted the money from the settlement by depositing the checks paid her.

An accord and satisfaction has been reached which operates as a release with respect to any claim arising under the arbitration and constitutes an absolute and complete bar to any legal action or suit arising out of said arbitration or said discharge. (Layton v. Selb Manufacturing Co., 244 F. Supp. 178 U.S.D.C.E. Mo., 60 LRRM 2169, aff'd. 359 F. 2d 715, 62 LRRM 2227.)*

* While in Layton v. Selb there was also a release, a formal release would add nothing to the accord and satisfaction reached here between the grievant, the Company and the Union in implementation of the award.

POINT 2.

WHOLLY APART FROM THE ACCORD AND SATISFACTION, WHICH SHOULD CONCLUSIVELY DISPOSE OF PLAINTIFF'S COMPLAINT, THE ARBITRATION AND AWARD MEET ALL THE APPLICABLE LEGAL STANDARDS AND CANNOT BE VACATED OR MODIFIED.

In a suit testing the validity of an arbitration award a court may not review the merits of the award, but must confine its inquiries to the limited questions of:

- (1) Whether the applicable agreement conferred upon the arbitrator authority to reach the award rendered and whether the dispute was one that the parties agreed to arbitrate.

United Steel Workers v. American Mfg. Co., 363 U.S. 564, 80 Sup. Ct. 1343, 4 L. Ed. 2d 1403.

United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 4 L. Ed. 2d 1424, 1429.*

United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 Sup. Ct. 1347, 4 L. Ed. 2d 1409.

Dallas Typographical Union v. A. H. Belo Corp., 372 F. 2d 577 (5 C.A. 1967).

International Association of Machinists v. Hayes Corp., 296 F. 2d 238 (5 C.A. 1968).

Safeway Stores v. Bakery Workers, Local 111, 390 F. 2d 79 (5 C.A. 1968).

* In the landmark case, *United Steel Workers v. Enterprise Wheel & Car Corp.*, the Supreme Court pointed out that it is not a function of the courts to review the merits of the construction of a collective bargaining agreement, stating (363 U. S. 593, 599; 4 L. Ed. 2d 1424, 1429):

"It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

Fischer v. Guaranteed Concrete Co., Minn. (1967), 151 N.W. 2d, 266.

Kroger Co. v. Teamsters Local 661, 380 F. 2d 728 (6 C.A. 1967).

Garment Workers v. Beauty Bilt Lingerie, Inc. (D.C.N.Y. 1961), 48 LRRM 2995.

Paper Mill Workers v. St. Regis Paper Co., 362 F. 2d 711 (5 C.A. 1966).

Morceau v. Gould-National Batteries, Inc., 181 N.E. 2d 664, 344 Mass. 120 (1962).

Jennings v. Westinghouse Electric Corp., 283 F. Supp. 308 at p. 312 (D.C.S.D.N.Y. 1968).

- (2) Whether the arbitrator in the application of the agreement engaged in such misconduct, such as corruption, fraud or undue means, as to be guilty of arbitrary or capricious action.

See *Paper Mill Workers v. St. Regis Paper Co.*, 362 F. 2d 711 (5 C.A. 1966).

See *Lodge No. 12, District No. 37, I.A.M. v. Cameron Iron Workers*, 292 F. 2d 112 (5 C.A. 1961).

See *Truck Drivers v. Acme Markets*, (D.C.E.Pa., 1967), 65 LRRM 2708.

See *Stereotypers v. Newark Morning Ledger Co.*, 261 F. Supp. 832 (D.C.N.J. 1966), *aff'd*. 397 F. 2d 594.

Two of the plaintiff's allegations constitute no legal basis for the relief requested. A court may not set aside an arbitration award simply because evidence was refused

admission or because an error of law was made by the arbitrator.

Stereotypers v. Newark Morning Ledger Co., (D.C.N.J. 1966), 261 F. Supp. 832, *aff'd*. 397 F. 2d 594.

Ficek v. Southern Pacific Co., 338 F. 2d 655 at p. 657 (9 C.A. 1964), cert. den. 380 U.S. 988.

Textile Wkrs. of America v. American Thread Co., 291 F. 2d 894 at p. 896 (4 C.A. 1961).

Fischer v. Guaranteed Concrete Co., ... Minn ..., 151 N.W. 2d 266 (1967).

Bower v. Eastern Airlines, Inc., 214 F. 2d 623 (3 C.A. 1954).

San Martine Compania de Nav. v. Sagueney Term Ltd., 293 F. 2d 796 (9 C.A. 1961).

The parties agreed to be bound by the Rules of the American Arbitration Association which authorizes the arbitrator to determine the materiality of evidence. (Kennelly Aff. p. 8, Exhibit 9, and Statement of Material Fact, Item 12.)

Only if plaintiff's remaining two allegations—that the arbitrator exceeded his authority or that he acted arbitrarily and capriciously—are found by the court to be true could the plaintiff's relief be granted.

Nothing in the entire record of this case even remotely suggests the arbitrator did not properly and with full authority decide what the Union and Company asked him to decide. The Award is definitely found within the four corners of the contract; there is no lack or abuse of authority, or arbitrary or capricious action, on the part of the arbitrator.

POINT 3.

THE DISPUTE WAS CLEARLY ONE WHICH THE PARTIES
AGREED TO ARBITRATE.

There can be no question that discharges are grievances intended by the parties to be resolved by arbitration, if not previously settled pursuant to pre-arbitration procedures set forth in the applicable agreement. Articles VI(3) and XVII of the agreement are too clear on this point to require argument, and it is assumed that plaintiff does not raise this issue. In numerous cases of analytical similarity, after an arbitration has been held the courts have dismissed complaints seeking second arbitrations because a party offers in support of his claim that grounds were left for further arbitration under the same grievance.

Todd Shipyards Corp. v. Industrial Union of Marine & Ship. Wkrs., 242 F. Supp. 606 (D.C.N.J. 1960).

Goldstein v. Doft, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd. per curiam*, 353 F. 2d 484, *cert. den.* 3 U.S. 960, 16 L. Ed. 2d 302, 86 Sup. Ct. 1226.

Ficek v. Southern Pacific Company, 338 F. 2d 655 (9 C.A. 1964), *cert. den.* 380 U.S. 988.

Union Hardware Division v. Local 247, I.U.E., U.S. D.C. Conn. 1968, F. Supp., 67 LRRM 2541.*

United Steelworkers v. Northwest Steel Rolling Mills, Inc., 324 F. 2d 479 (9 C.A. 1963).

* Apparently this case is unreported in the Federal Supplement.

POINT 4.

ARTICLE VI(3) OF THE APPLICABLE AGREEMENT CONFERS
FULL AUTHORITY UPON THE ARBITRATOR TO REACH THE
AWARD RENDERED.

Mrs. McLendon could have been dismissed by the Company only for "good and sufficient cause" under Article VI(3). But the contract also confers on the Company the right to dismiss for "willful neglect of duty or gross misconduct"—each more serious offenses, and both, if sustained, producing a loss of severance pay required by the contract to be paid where a discharge is only for good and sufficient cause. The Company determined that Mrs. McLendon's conduct was sufficiently serious to warrant the more severe discharge permitted under the contract, and dismissed her for "gross misconduct." The arbitrator did not sustain the Company's judgment that the conduct warranted dismissal for gross misconduct, but did conclude that it constituted good and sufficient cause for discharge. The question he decided was not only authorized but required to be decided under the contract.

It is beyond question that a discharge for "gross misconduct" under the contract includes a discharge for "good and sufficient cause," and indeed the plaintiff Union acknowledged this in its submission letter to the American Arbitration Association. It claimed the discharge was not warranted at all, i.e., was not for "good and sufficient cause," thus explicitly placing both questions in issue before the arbitrator, as was confirmed by the company's submission in its opening statement.

Both discharge issues were submitted to the arbitrator, and both were clearly determinable by him under the provisions of the contract. The plaintiff would have no argument concerning the arbitrator's authority to consider whether Mrs. McLendon was discharged for good and sufficient cause *if he had concluded that she was not so discharged*. His award was fully within his authority, and he exercised no authority not conferred by the contract.

POINT 5.

IN RESOLVING THE GRIEVANCE THE ARBITRATOR DID NOT ACT
IN AN ARBITRARY, CAPRICIOUS OR IRRATIONAL MANNER.

Since plaintiff has pleaded no facts to support this wholly unwarranted conclusory allegation, it is difficult for defendant to argue the point. The plaintiff's assertion appears to be a catch-all conclusionary statement derivative from its other allegations which cannot be sustained on the basis of the pleadings and the record. See, *Paper Mill Workers v. St. Regis Paper Co.*, 362 F. 2d 711 (S.C.A. 1966). The record—hearing, briefs, opinion and award—so abundantly demonstrate the contrary, there seems to be no need for argument. This was a routine discharge case, although for most unusual conduct by a newspaper reporter, and it was conducted by the arbitrator with the utmost of skill, thoroughness, fairness, propriety, and sound judgment. There is absolutely no legal ground to support, or basis for, plaintiff's allegation.

The arbitrator understood the issues raised by the discharge. He properly construed and exercised the applicable contract provisions. He allowed more than adequate opportunity for direct and cross examination evidence, as well as documentary evidence. His analysis and judgment of the facts constituting the employee's plagiaristic conduct were thorough, careful and sound. His award was unquestionably within his contract power to render. In no way did he violate any legal or contract standards in disposing of the grievance. Plaintiff has had a full, fair and legally valid arbitration. Its only reason for complaint is that it lost.

The one ruling of the arbitrator which the plaintiff apparently contends was erroneous and which it might contend was arbitrary was his refusal to allow plaintiff to examine Mrs. Blue, the author of the plagiarized document, on the subject of whether she might have plagiarized in the preparation of her historical report. As has

been indicated above, even if erroneous, this ruling on admission of evidence cannot be the basis for a judicial disturbance of the award unless the arbitrator engaged in misconduct and the evidence was of such significance as to have deprived plaintiff of a fair hearing. This it clearly was not and the arbitrator so ruled as he had the authority to do. Plaintiff made *no* objection or reference to this or any other ruling in its arbitration brief. Moreover, it could not properly do so in any event, because the ruling was obviously correct—Mrs. Blue's conduct in preparing her material having had no relevance or material bearing on the question of the employee's conduct in using Mrs. Blue's document in the preparation of her article.

Beyond this slim reed the record is devoid of any action by the arbitrator which could by the most extreme stretch of the imagination be characterized as arbitrary, capricious or irrational. Plaintiff, indeed, must recognize that in its zeal to get another chance to win this grievance in arbitration it has callously and unjustly maligned one of the finest and most capable of arbitrators mutually selected by the parties to make a final award and to decide upon the materiality of evidence. Few arbitration hearings, opinions and awards could withstand so well the unjust and unwarranted attack leveled by plaintiff.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that defendant's motion for summary judgment should be granted and the complaint should be dismissed.

ROYALL, KOEGEL, ROGERS & WELLS

By /s/ STUART ROTHMAN
A Member of the Firm

/s/ GERALD W. SIEGEL
Gerald W. Siegel
Counsel for The Washington
Post Company

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Affidavit of Lawrence W. Kennelly

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

LAWRENCE W. KENNELLY, being duly sworn, deposes and says:

* * * * *

4. Article XVII(2) of said collective bargaining agreement provides that in a dispute arising from a discharge of an employee, the authority of the arbitrator shall be that specified in Article VI of this agreement. It is the established, consistent and well understood practice between plaintiff and defendant that discharge cases are handled in the following way by reason of the mutual agreement contained in Article VI:

(1) If upon grievance conference the discharge is found by mutual agreement not to have been based on good and sufficient cause, the discharged employee is entitled to reinstatement with full pay and service record unimpaired.

(2) If upon conference the Publisher and the Guild are unable to agree as to the proper disposition of the discharge grievance, the matter may be referred by the Guild to arbitration under Article XVII(2) of the agreement.

(3) The jurisdiction of the arbitrator in a discharge case is defined by mutual agreement of the parties as follows:

(a) If the arbitrator renders an award that the discharge was not for good and sufficient cause, the Publisher would be obligated either

(i) to restore the discharged employee to his position with full pay and with service record unimpaired, or

(ii) at the option of the Publisher to pay the discharged employee any sums due him at the time as

severance pay under Article X of the agreement and further as payment in lieu of notice required under Article VI(3) and

(iii) as a dismissal indemnity an amount computed according to a schedule set out in Article VI(3).

(b) If the arbitrator were to render an award holding only that the discharge was not willful neglect of duty or gross misconduct, but was for good and sufficient cause, the employee is entitled to payment of severance pay as provided in Item (a)(ii) above but the Publisher does not have to pay the employee the indemnity schedule provided for in (3)(a)(iii) of this paragraph 4.

(c) Thus in the case of a discharge arbitration, the jurisdiction of the arbitrator is to determine

(i) whether the discharge was for good and sufficient cause. If the arbitrator determines that the discharge is not for good and sufficient cause, the employee is entitled to reinstatement unless the Publisher exercises the option not to reinstate him but to pay him two different kinds of payments: (a) severance pay under Article X of the agreement which also includes a payment in lieu of notice required under Article VI(3), and (b) another kind of payment called a dismissal indemnity computed in accordance with the schedule set out in Article VI(3). If the discharge is for willful neglect of duty or gross misconduct, the arbitrator is also required to determine whether or not the Publisher's determination was justified, for if the discharge was for willful neglect of duty or gross misconduct, the employee by reason of Article X of the contract is not entitled to severance pay, and of course, it not entitled to the dismissal indemnity which the company pays in exercising its option not to reinstate an employee who was not discharged for just cause.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**Statement of Material Facts as to Which No Genuine Issue
Exists Submitted in Support of Motion for Summary Judgment
by the Washington Post Company**

1. On January 26, February 12 and February 22, 1968, an arbitration was conducted between defendant and plaintiff before an arbitrator, Emanuel Stein, pursuant to Articles VI(3) and XVII (1) and (2) of the collective bargaining agreement between the parties wherein the plaintiff by letter demand for arbitration dated October 20, 1967, to the American Arbitration Association submitted the following issues:

“Under the terms of Article XVII and Article VI paragraph 3 of the Washington Post-Guild contract, the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a women's page reporter for ‘gross misconduct’ to arbitration.

“The alleged misconduct involved an unproved charge of plagiarism against Mrs. McLendon. The Guild maintains that the discharge was not for good and sufficient cause.”

2. On October 23, 1967, three days after the demand for arbitration, plaintiff wrote all union members confirming the results of the grievance hearing held October 20 as follows:

“Last Thursday a by-lined reporter with 14 years standing was fired. The employe had been foresighted enough to outline the case to us when she saw the ax about to fall, so the Guild was able to meet immediately with the Company to protest.

“Representing the Company were its counsel, Gerald Siegel, and its assistant business manager for labor relations, Lawrence Kennelly. Representing the Guild

were Administrative Officer Brian Flores, Local Representative Michael Stuart and myself. The Guild demanded the employee's immediate reinstatement because the firing was precipitate and without grounds under the contract, which provides: 'No employee shall be discharged except for good and sufficient cause.'

"The Company refused to reinstate her and claimed the firing was for good cause—'gross misconduct.' They showed us their key evidence, which failed to dispel our first impression that the discharge was groundless.

"The Guild and the Company agreed to move immediately to select an impartial arbitrator so that the matter would be settled as soon as possible. When the Guild and the Company reach an impasse, they agreed on an arbitrator—a sort of rent-a-judge—who hears the case and hands down a binding ruling."

3. At the arbitration hearing the arbitrator requested opening statements. The Publisher stated the issue presented as follows:

"The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement."

The Union made no counterstatement.

4. In its post-hearing brief to the arbitrator the Union stated the issues for decision by the arbitrator under the two following headings:

"I. The Company's Alleged 'Standard' of Plagiarism Is At Variance With Common Practice at The Post And In the Industry At Large, Was Never Disseminated to Mrs. McLendon Or the Reporting Staff, And Cannot Justify the Discharge."

"II. Under the Circumstances, Discharge Was Too Excessive a Penalty to Constitute 'Good and Sufficient Cause.'"

5. On April 12, 1968, the arbitrator made his award as follows:

"The discharge of Mrs. Winzola McLendon was not for willful neglect of duty or gross misconduct, but it was for good and sufficient cause."

6. The award of the arbitrator is clear and unambiguous. It precisely covers the subject matter of the grievance presented under Articles VI(3) and XVII of the collective bargaining agreement. The decision and award contained in the arbitrator's opinion dated April 17, 1968, is clear and unambiguous.

7. Following the issuance of the award the plaintiff, the grievant and Company representatives met on or about May 6, 1968, to compute the separation pay due grievant as required by the collective bargaining agreement under the award. The proper computation of the time worked by grievant for purposes of arithmetically determining separation pay was disputed. The matter was resolved by mutual agreement plus an additional voluntary adjustment to be paid by the Company. Said settlement agreement was confirmed by letter dated May 7, 1968, from Company to the Union. Grievant has received the money by depositing the checks paid her under the settlement agreement.

8. Subsequent to the settlement arrangement reached May 6, namely, on or about June 19, 1968, grievant's husband, Captain John B. McLendon, continued to dispute the computation of the time worked by grievant for purposes of determining her separate pay but did not dispute the fact that the award was final and that a settlement arrangement had been reached as to the basis upon which the arbitration would be implemented.

9. On July 11, 1968, after grievant had accepted the money in discharge of the Company's obligation to her under the May 6-7 arrangement, the Union filed the complaint herein. At no time has (a) Union made a demand for rearbitration of the McLendon grievance upon the Company and (b) at no time has the plaintiff union denied that the settlement arrangement of May 6 and the payment thereunder constituted an accord and satisfaction of the union's grievance.

10. The facts giving rise to the dispute can be briefly summarized as follows (the following summary of facts is excerpted from the findings of the arbitrator annexed as Exhibit A to the Complaint):

The arbitrator found:

On Monday or Tuesday, August 28 or 29, 1967, grievant was assigned to do a story on Prospect House, an historic house in Washington, for publication Sunday, September 10. She did a rough lead on Thursday, August 31, which was shown to Louise Oettinger, the editor, and grievant was relieved of other editorial work 10 a.m. Saturday, to work on the Prospect House story. She obtained from the owner of Prospect House, Mrs. Chatham, a manuscript signed by Mrs. L. Blue which Mrs. Blue had prepared for the Fine Arts Commission. When the owner of Prospect House turned the report over, she requested it be returned in a couple of hours and that no reference be made to the report in grievant's story. Mrs. McLendon's article was published September 10. On October 10, 1967, Mrs. William L. Blue wrote the Publisher that she wanted the newspaper to know "almost all of the historical material so liberally quoted by Mrs. McLendon was taken from an historical survey of Prospect House prepared for the Fine Arts Commission. Of course Mrs. McLendon failed to credit the latter organization in any way, nor did she ask permission to use any part of this study from a member of the

Fine Arts Commission . . . or from me, the volunteer historical researcher who prepared the survey."

As the arbitrator found:

Mrs. McLendon utilized extensive passages of the Blue report without attribution in the article itself, she failed to secure permission to use the report from the persons authorized to grant such permission; she failed to inform her editors of the circumstances under which she secured the report as well as the conditions the owner of Prospect House attached to its use; she failed to ascertain whether or not the Blue report was in fact what she believed it to be, namely, a handout; and she should have been alerted by the owner of Prospect House's unwillingness to have the Blue report leave the owner at all and at its subsequent insistence that it be returned in an hour or two and her insistence that no reference be made in the story to her report. She was on notice by the fact that Mrs. Blue's name was appended to the report; that many footnote superscripts appear in the manuscript and that two pages of footnote references were part of the report. She did not ask any questions whatever on the foregoing matters of Mrs. Chatham or when the manuscript was prepared or whether it would be published.

The arbitrator concluded (at page 26 of his opinion) that grievant's omissions cannot be made the basis for a conclusion that she could reasonably have regarded the report as a handout which the owner of Prospect House could rightly make available to reporters to be used as they see fit, subject to the condition that no references to the document be made in their stories.

The Company discharged Mrs. McLendon on October 19.

A grievance conference with the Union and grievant present was held the same day at which time the Union grieved

that the grievant was not discharged for just cause. The Company took the position that she was discharged for just cause and additionally, the discharge was justified for gross misconduct. The Union asked for a written statement from the Company and the Company responded by letter dated October 26, 1967, to wit:

"Dear Mrs. McLendon:

"Pursuant to a request made on your behalf by Mr. Ira Lechner, attorney for the Washington-Baltimore Newspaper Guild, this is to advise you that you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism."

11. In the arbitration hearing the arbitrator sustained an objection to a question Union counsel asked a witness, Mrs. Blue, the author of the document from which grievant had copied. The question and the ruling appear on page 87 of the 550-page transcript as follows:

"Q. Back of your report there are some thirty footnotes to a number of different sources.

"A. Right.

"Q. There are places within the report where quotes appear. Am I correct in assuming that the only materials here that are verbatim—

"Mr. Siegel: Dr. Stein, I would like to object.

"Dr. Stein: Let him finish the question. If you would, hold your answer, Mrs. Blue.

"Q. —that are verbatim were the source material surrounded by quotes?

"Dr. Stein: I would sustain the objection. It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica.

"Q. One further question, before you went to Mrs. Dudman, or before you wrote the letter, did you discuss this matter at all with Mr. Bradlee?

"A. No. Never."

In the three-day hearing this was the sole situation in which the arbitrator refused to hear and consider the answer to a question by counsel.

12. Rules 28 and 31 of the American Arbitration Association read as follows:

"28. Evidence—The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. . . . The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. . . ."

"31. Closing of Hearings—The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. . . ."

13. Articles VI(3), X and XVII of the collective bargaining agreement read as follows:

"(3) No employee shall be discharged except for good and sufficient cause. Discharge of new employees with less than six (6) months employment shall not be subject to review by the Standing Committee. Two weeks' notice in advance of discharge shall be given to employees with six (6) months or more of continuous employment except in cases of discharge for willful neglect of duty or gross misconduct. Any such employee upon receipt of notice of discharge, or upon discharge where no notice is given, may apply to the Standing Committee so that the Committee may confer with The Post in the case. If, upon conference, a discharge is found by mutual agreement not to have been based on good and sufficient cause, The Post shall restore the discharged employee to his position, with

full pay for the period from the date of discharge to date of reinstatement with service unimpaired.

“Conferences regarding any discharge shall proceed with due diligence and shall be concluded within thirty (30) days after the notice of discharge or after discharge where no notice is given. If, upon conference, The Post and the Guild are unable to agree as to the proper disposition of the case within thirty (30) days after notice of discharge, or after discharge where no notice is given, the matter may be referred by the Guild to arbitration under Paragraph (2) of Article XVII of this Agreement within fifteen (15) days after the end of such thirty (30) day period. If the Arbitrator renders an award that the discharge was not for good and sufficient cause, The Post shall be obligated either (a) to restore the discharged employee to his position with full pay for the period from the date of discharge to the date of reinstatement and with service record unimpaired, or (b) at the option of The Post to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI and a dismissal indemnity computed in accordance with the following schedule:

<i>Period of Service</i>	<i>Dismissal Indemnity</i>
More than six months but not more than five years ..	Ten weeks pay
More than five years but not more than ten years	Twenty weeks pay
More than ten years	Thirty weeks pay

The dismissal indemnity shall be computed on the basis of the highest regular weekly salary received by the employee during the two (2) years next preceding

the termination of his service. If the Arbitrator renders an award holding only that the discharge was not for willful neglect of duty or gross misconduct, The Post shall be obligated to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI."

"ARTICLE X—SEVERANCE PAY

"(1) When an employee who has served The Post more than six (6) consecutive months in his latest period of employment is discharged for any reason other than willful neglect of duty or gross misconduct, he shall be paid, in addition to all other amounts due him, one (1) week's salary for each six (6) months, and major fraction thereof, of his latest period of continuous employment beginning not more than twenty-five (25) years prior to the effective date of this Agreement and twenty-six (26) years prior to the effective date of his discharge as of the first anniversary date of this Agreement and twenty-seven (27) years prior to the effective date of his discharge as of the second anniversary date of this agreement. Severance pay shall be computed on the basis of the highest regular weekly salary received by the employee during the two (2) years next preceding the termination of his service.

"(2) If an employee's services are terminated by death, there shall be paid to his legal representatives a sum equal to the amount of severance pay to which he would have been entitled under Paragraph (1) if he had been discharged, less any legal costs and expenses incurred by The Post in making the payment."

“ARTICLE XVII—GRIEVANCE PROCEDURE

“(1) The Guild shall designate a committee of its own choosing to take up with The Post any matter arising from the application of this Agreement, or affecting the relations of the employees and The Post. The Post agrees to meet with the committee within five (5) days after request for such meeting.

“(2) Any matter arising from the application of this Agreement, which the Guild and The Post have not been able after reasonable effort to settle, shall be submitted to arbitration, upon notice of either party to the other, under the Voluntary Labor Arbitration Rules then obtaining of the American Arbitration Association. Expenses of arbitration which are jointly incurred shall be shared equally by the parties. The parties agree to abide by the award subject to such rules and regulations as any Federal agency having jurisdiction may impose. In a dispute arising from a discharge of an employee, the Authority of the Arbitrator shall be that specified in Article VI of this Agreement.”

ROYALL, KOEGEL, ROGERS & WELLS

By STUART ROTHMAN

A Member of the Firm

GERALD W. SIEGEL

Gerald W. Siegel

Counsel for The Washington
Post Company

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**Plaintiff's Opposition to Defendant's Motion for
Summary Judgment**

Plaintiff, Washington-Baltimore Newspaper Guild, by its attorneys, Spelman, Lechner and Wagner, hereby oppose the motion for summary judgment filed herein by defendant, and as grounds for its said opposition, plaintiff hereby adopts and incorporates herein by reference the Statement of Material Facts and Memorandum of Points and Authorities filed herein by plaintiff in support of its cross-motion for summary judgment.

SPELMAN, LECHNER & WAGNER

By SEYMOUR J. SPELMAN
Seymour J. Spelman
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1714-68

WASHINGTON-BALTIMORE NEWSPAPER GUILD, LOCAL 35,
Plaintiff

v.

THE WASHINGTON POST COMPANY, *Defendant*

**Memorandum of Points and Authorities in Support of
Plaintiff's Cross-Motion for Summary Judgment**

Plaintiff's basic contention is that a single question was submitted to the arbitrator for decision, namely, was Mrs. McLendon guilty of "gross misconduct", the sole ground asserted by the company for her discharge. When the arbitrator answered that question in the negative, as he did, his authority ended. But he went beyond that and decided a question which had not been submitted to him. He held

that, although not guilty of "gross misconduct" as charged by the company, her conduct was such that the company could have discharged her under the general category of "good and sufficient cause" and, on that basis, upheld the discharge. Plaintiff asks this court to enforce the Award insofar as it holds that Mrs. McLendon was not guilty of the charge of "gross misconduct", since the holding on that question is plainly within the authority of the arbitrator. However, plaintiff asks that, to the extent that the arbitrator went beyond that issue, as described above, his award be vacated and Mrs. McLendon be reinstated to her position at the Post, with back pay and seniority rights unimpaired.¹⁵

In the alternative, plaintiff asks that the entire Award be vacated and the matter be remanded for an arbitration *De Novo* because (1) the arbitrator refused to hear and consider certain crucially material evidence, thereby denying Mrs. McLendon a fair hearing; and (2) his Award is arbitrary and capricious in that the conclusions on which he upholds the discharge have no evidentiary support in the record. In a new arbitration, appellant also asks that the parties be required to select a new arbitrator under the Rules of the American Arbitration Association, for the present arbitrator cannot be expected to approach the matter *de novo*, as required.

A. The Arbitrator Exceeded His Authority.

An arbitrator is not a court of general jurisdiction. The scope of his authority is no broader than the issue submitted to him by the parties for decision. In determining the scope of an arbitrator's authority, the Court examines the collective bargaining agreement between the parties and the particular question involved and submitted in the case. If it finds the arbitrator has exceeded his authority, it will vacate the award.

¹⁵ Of course, the company would be entitled to offset against back pay the amount of money paid to Mrs. McLendon as severance pay under the Award.

These, of course, are Hornbook principles requiring no extensive citation of authority. A U. S. District Court expressed them clearly and succinctly in *Lee v. Olin Mathieson Chemical Corporation*, 271 F. Supp. 635 (1967).

"Whenever an arbitrator's authority to make a particular award is questioned, the court must look to the collective bargaining agreement and the submission to determine his authority since they are the source and limit of his authority." (Citing cases).

"It is settled that if the arbitrator exceeds the scope of his authority, the award is unenforceable." (Citing cases).¹⁶

Thus, the question in the instant case boils down to this: What was the issue or question which the parties asked the arbitrator to decide?

The contract contains the general provision that an employee can only be discharged if the employer has "good and sufficient cause" for doing so. The phrase "good and sufficient cause", however, is obviously not a specific statement of the reason for a discharge in a particular case, but only a general criterion designed to provide job security by forbidding arbitrary discharge. The phrase does not take on a specific meaning in an individual arbitration case until the employer gives it content by expressing his reason for discharging the particular employee. In the instant case, the employer said that it discharged Mrs. McLendon on the ground that she was guilty of gross misconduct for committing a fraudulent act of plagiarism. No other ground for discharge was given. Thus, in terms of the contract, the employer stated: Mrs. McLendon was guilty of "gross misconduct" for committing a deliberate act of plagiarism

¹⁶ In *Lee v. Olin Mathieson*, the court held that the award "is unenforceable to the extent that the arbitrator exceeded his authority." A single question had been submitted and "once he decided that [question], his jurisdiction ended." This is exactly the argument plaintiff makes here. The court in *Lee* enforced that part of the award found to be within the scope of the submission.

and this constituted the "good and sufficient cause" for her discharge.

As plaintiff has demonstrated in the statement of facts, from start to finish the only issue presented and argued by the company in the arbitration was whether Mrs. McLendon was guilty of "gross misconduct" for committing a "major act" of "fraudulent plagiarism." At *no* time did the company ever state, suggest or imply to the arbitrator that, even if the arbitrator were to find her guilty of misconduct less than "gross", he should nevertheless uphold the discharge under the generalized criterion of "good and sufficient cause." If the company really considered that the second, alternative issue had also been submitted to the arbitrator, it is not conceivable that it *never* would have made any argument on that alternative ground—not at the hearing and not in its extensive post-hearing brief to the arbitrator.

And yet, it never did make any such argument. On the contrary, it stated that "under the applicable contract . . . , the discharge was for gross misconduct . . ." and on the last page of its brief it becomes incontestably clear that the company was not seeking to defend the discharge on any ground less than gross misconduct. It stated: ". . . she has engaged in gross misconduct . . . [and] there is no evidence in this record which alters or mitigates the serious degree and character of Mrs. McLendon's conduct."

If, as the company now contends for the first time, the arbitrator had been submitted the second and alternative issue of whether Mrs. McLendon was properly discharged even if her misconduct were not considered "gross", then the company obviously would have made that alternative argument at that point in its brief, namely: But even if you, Mr. Arbitrator, *do* find some facts in mitigation, we would still discharge her for the lesser offense and we ask you to uphold us on that basis.

Such argument was never made. Indeed, as the statement of facts shows, the company based the discharge and

its case before the arbitrator on the sole issue of gross misconduct on the ground of fraud. If the alternative second issue had been submitted to the arbitrator, it surely would have showed up somewhere along the line of argument.

Thus, in going beyond the issue of "gross misconduct", the arbitrator was saying, in effect: I find that Mrs. McLendon was not guilty of gross misconduct, as the company charges. But I find that she did engage in misconduct which would justify her discharge on a lesser ground encompassed within the phrase "good and sufficient cause" and I therefore uphold the discharge on that basis.

In the words of the Supreme Court, an arbitrator "does not sit to dispense his own brand of industrial justice", and yet that is exactly what the arbitrator has done in this case. [*United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 at 597, 80 S. Ct. 1358 at 1361]. This kind of action plainly exceeds his authority for it goes beyond the scope of the submitted issue.

In exceeding his authority in this manner, the arbitrator has not only transgressed the jurisdictional rules of arbitration; he has very seriously prejudiced the grievant, Mrs. McLendon.

The company made it clear (in the words of its counsel) that "It is the total behavior of Mrs. McLendon in connection with the use of Mrs. Blue's report in her article which represents the grounds for her discharge." (Tr. 11). That "total behavior" includes not only the use of the Blue material by Mrs. McLendon but also the circumstances under which she received the report from Mrs. Chatham, the time pressure under which she was operating in writing the story and the reasonableness of her reliance on Mrs. Chatham's authorization on use and her restriction on attribution.

The arbitrator found it "crystal clear" that it was "impossible" for Mrs. McLendon to have written the story on Prospect House under the Bradley-Wiggins' standard of "original research" within the allotted time and on that

basis he absolved her of the charge of "gross misconduct." But the company, in deciding to discharge her, admitted it did not even consider the relevance or impact of this element of "impossibility" growing out of the time limitations. (Award, p. 27, 1st para.; Tr. 189). It might well be that, on reconsideration and taking this element into account, the company would now consider discharge too severe a penalty, particularly for an employee of 13 years unblemished service. The point is that the company's judgment—by admission—has *never* been exercised on the McLendon case with that significant element of "impossibility" take into account. It is only the *arbitrator* who has considered the impact of that element on the justification for discharge. And it is the arbitrator, not the company, who has said that, even considering this element of impossibility, the discharge is still justified. This is plainly a case of an arbitrator "dispens[ing] his own brand of industrial justice." Only the company can do this, and Mrs. McLendon is therefore entitled to have that judgment exercised only by the company. This is especially important in a case where it was the alleged *gross* character of the offense which triggered the extreme penalty of discharge and where the company indicated in its argument that it would not have imposed discharge if *the misconduct* had not been gross.

This same thing can be said with respect to the relevance of consent on the critical question of fraud. The decision to discharge Mrs. McLendon for what the company believed to be her "fraudulent" use of the Blue report was made by Mr. Bradlee, the Managing Editor, and Mr. Wiggins, the Editor. Mr. Bradlee, however, did not even tell Mr. Wiggins about the circumstances under which Mrs. McLendon got the material from Mrs. Chatham (Tr. 131); Bradlee did not consider the issue of Mrs. Chatham's consent to be relevant. (Tr. 32, 63). But it developed at the hearing that Mr. Wiggins *did* consider consent relevant and indeed declared that permission or consent "diminishes the offense."

Yes, the arbitrator, by going beyond the submission to decide for himself that the company would have fired Mrs. McLendon even if her misconduct was not gross, has actually deprived Mrs. McLendon of the opportunity for the company, not the arbitrator, to consider whether it still wants to impose the drastic punishment of discharge on her for *less* than gross misconduct, after taking into account the evidence that emerged at the hearing concerning the circumstances under which Mrs. McLendon came into possession of the Blue report. Perhaps a second look at those circumstances would in the company's mind, "diminish" the offense below the point of the capital punishment of employment, i.e., discharge.

In effect, the arbitrator has deprived Mrs. McLendon of a fair and full hearing by the company on the offense considered at a level below gross misconduct, by his assumption as to what the company would do at such hearing. The arbitrator assumes that, because the company *could*, on reconsideration, fire Mrs. McLendon for less than gross misconduct, it *would* necessarily do so, and, on that assumption, he upholds the discharge.

This kind of arbitral action is plainly wrong and there are many cases where courts have set aside awards in circumstances analogous to the present.

Lee v. Olin Mathieson Chemical Corporation, (271 F. Supp. 635) which we have cited previously, is particularly relevant here because the court there upheld the arbitrator's award only to the extent that it stayed within the submission and set aside that part which exceeded the scope of the submission. This is the remedy plaintiff seeks here.

Polycast Corp. v. Local 8-102, Oil Workers, 59 LRRM 2572 (Connecticut Superior Court) is very much like the present case. The question submitted to the arbitrator was: "Was employee James Epps disciplined for just cause under the terms of the labor agreement dated March 24, 1964? If not, what should the remedy be?"

The arbitrator found that Epps had not been disciplined for just cause and reinstated him to his job. But, the arbitrator felt Epps had been guilty of some misconduct and, on that basis, denied him back pay. For this form of administering "his own brand of industrial justice," the Court set aside the award because "the arbitrator exceeded his power."

In *Stove Mounters Union v. Rheem Mfg. Co.*, 32 LA 266, a California court in setting aside an award, held that a submission agreement putting to arbitration the issue of whether the employer is required to pay 10 days vacation pay to an employee does not imply a power to award vacation pay for less than 10 days. The court ruled that the arbitrator had the power simply to answer yes or no to the submitted question of whether the employee was entitled to 10 days vacation pay.

In *Lynchburg Foundry Co. v. Steelworkers*, 68 LRRM 2379 (1968), the District Court for the Western District of Virginia vacated the arbitrator's award on the basis that, when the arbitrator found the discharge unjustified and reinstated the employee, he exceeded his authority when he then went on to impose the lesser penalty of loss of back pay. As the Court said: "Once the arbitrator determined this (i.e., that the discharge was not justified), his authority terminated." See also: *Textile Workers of America v. American Thread Co.*, 291 F.2d 894 (1961, 4th Cir.).

* * * * *

In response, the company makes the following argument: [See pages 9 and 10, defendant's "Memorandum of Points and Authorities, etc."]: Mrs. McLendon could have been dismissed simply for "good and sufficient" cause. But the contract also confers on the company the right to fire for the more serious offense of "gross misconduct." "The company determined that Mrs. McLendon's conduct was sufficiently serious to warrant the more severe discharge permitted under the contract and dismissed her for 'gross

misconduct.''' The arbitrator rejected gross misconduct as a basis for discharge but upheld it on the grounds of "good and sufficient cause." "Both discharge issues (says company counsel) were submitted to the arbitrator. . . ." Why? Because, in his words, "It is beyond question that a discharge for 'gross misconduct' under the contract includes a discharge for 'good and sufficient cause.' ''¹⁷

This argument makes no sense at all.

FIRST: The contractual phrase "good and sufficient cause" is not a ground for discharge, as the company argues. It is a general phrase which encompasses any and all forms of misconduct which might constitute a valid ground for discharge. If an employer were to fire an employee, asserting only that general language as the ground, he would of course be required, as he was in this case, to specify the nature of the misconduct which, in the employer's view, constituted the "good and sufficient cause" for discharge. Here, the employer stated that Mrs. McLendon was guilty of gross misconduct because of an alleged act of plagiarism. That act of gross misconduct became the specific charge against Mrs. McLendon and hence the scope of the issue submitted to the arbitrator. It thus makes no sense—as a matter of logic or semantics—to state that "Both discharge issues ("good and sufficient cause" and "gross misconduct") were submitted.

SECOND: It is perfectly true that, under the contract, the parties *could* have submitted a broader or an alternative issue to the arbitrator. The company *could* have said: Mrs. McLendon was guilty of gross misconduct for committing fraudulent plagiarism; but even if her conduct is

¹⁷ The temptation is to respond to this argument solely with the following apt quote and let it go at that:

"The issue is not what the parties *now declare* a grievance or dispute to be, but what they *declared* the grievance or dispute to be when they submitted it in writing to the arbitrators:" *Procter & Gamble Ind. Union v. Procter & Gamble*. Plaintiff would be happy here to be judged by that criterion.

found not to be gross or fraudulent, we still want to fire her for ordinary misconduct. But, as we have shown in the statement of facts, that was not in fact the way the issue was framed or tried. More than that, it was plain from the company's argument that the reason it imposed the drastic punishment of discharge (rather than some lesser penalty) was exactly because it considered Mrs. McLendon's misconduct to be not ordinary but gross.¹⁸ That statement is wholly inconsistent with the notion, now advanced by the company, for the first time, that it also fired her for *ordinary* misconduct. Indeed, the implication of the company's whole argument is that, if this had been just ordinary misconduct (i.e., less than "gross"), the company would *not* have fired her. It was the gross and fraudulent character of the misconduct which triggered the company's drastic discharge decision. The heart of the whole controversy was the "gross" and "fraudulent" quality of the offense; and this is plain, both from the transcript and exhibits and the briefs submitted to the arbitrator.

THIRD: In trying to make its point, the company looks to the general contract language for determining the scope of the arbitrator's authority and avoids almost entirely the form in which the particular case was submitted to the arbitrator. But, the court must look to the collective bargaining agreement *and* the submission to determine the arbitrator's authority. *Lee v. Olin Mathieson Co.*, 271 F. Supp. 635, 639. The contract is significant in that it spells out how far the parties *may* go in arbitration, but it is the submission which spells out how far they *did in fact* go in the particular case.

In a sense, the submission is to the collective bargaining contract what a statute is to a constitution. In determining

¹⁸ In its brief to the arbitrator (Exhibit I), the company states: "That this is not an ordinary form of misconduct for an employee is self-evident." (Tr. 17). "It is the status of Mrs. McLendon as a fully experienced, seasoned reporter that makes her fraudulent use gross misconduct." (Tr. pages 17-18).

the scope of a statute, one does not look to the constitution. The constitution tells how far the legislature *can* or *may* go in passing a statute but this does not mean that, in passing the statute in question, the legislature went the full constitutional distance. The same is true for an arbitration. The fact that the parties could have submitted, under their collective bargaining contract, an issue in its broadest terms, does not mean, in a particular instance, that they have in fact submitted the issue in those broadest terms. You cannot, therefore, determine the scope of the arbitrator's power or jurisdiction in the present case by examining the contract; you can only determine his authority by examining the scope of the issue as submitted by the parties. As to that, the facts very clearly limit his authority to the issue of gross misconduct.

Finally, the argument that the greater includes the lesser and that, therefore, the power to determine gross misconduct necessarily includes the lesser power to determine ordinary misconduct has no validity in the arbitration context. The phrase "the greater includes the lesser", plucked from the criminal context, simply means that when a man is charged with crime "x" a court may find him innocent of crime "x" but guilty of crime "y", provided that all of the elements necessary to prove crime "y" were included within the proof of crime "x". But, the tacit premise of this concept is that the court has general jurisdiction over both crime "x" and crime "y". This is not true of an arbitrator's authority. An arbitrator is not a court of general jurisdiction. His jurisdiction is limited expressly and solely to what the parties grant him. Therefore, it is begging the question to assert that the greater (gross misconduct) includes the lesser (ordinary misconduct), for the very question in this arbitration is: *Did* the parties give the arbitrator the jurisdiction or power to determine the lesser? Here, the answer is plainly negative. Or stated otherwise: It is intent, not logic which determines the scope of an arbitrator's authority.

B. The Arbitrator Refused to Admit Crucially Material Evidence.

Mrs. McLendon was fired for alleged plagiarism in her use of what the company described as Mrs. Blue's literary composition. The Guild sought to introduce evidence which would have shown that most if not all of the material in the Blue report which appeared without quotation marks had been copied verbatim by Mrs. Blue from historical sources. The arbitrator refused to allow the evidence because he said: "It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica."

It is a self-evident proposition that the refusal on the part of an arbitrator to admit material evidence deprives the party of a fair hearing and requires that the award be vacated and the matter be remanded for a new hearing. *Harvey Aluminum, Inc. v. Steelworkers*, 64 LRRM 2580. Even the defendant acknowledges this principle, at least where "the evidence was of such significance as to have deprived plaintiff of a fair hearing."

The evidence refused here clearly goes to the very heart of the matter. First, plaintiff wanted to show that Mrs. McLendon was not guilty of the very offense for which she had been discharged, namely, "appropriating the literary composition" of Mrs. Blue. This evidence would have shown that this material was not in fact Mrs. Blue's composition. Secondly, the plaintiff wanted to show that the material was historical and in the public domain and that its use was not plagiarism, neither by Mrs. Blue nor by Mrs. McLendon. And finally, plaintiff wanted to demonstrate that, even assuming the worst, Mrs. McLendon was not guilty of plagiarism because "a piracy of a piracy" is not plagiarism. "When it is said that a mere new disposition of existing materials may be original, this must be taken with the limitation that the materials are such as may be lawfully used; *there can be no protection for that which*

is itself a piracy." *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (1903). (Emphasis added).

Thus, the evidence was patently material and the arbitrator was patently wrong in refusing to hear or consider it, for it most certainly *could* make a difference "if Mrs. Blue had lifted the whole report from the Britannica."

In the event the court does not enforce the valid part of the Award and reinstate Mrs. McLendon—as requested by plaintiff in the previous section—then plaintiff asks the award to be vacated and the matter remanded for a new hearing, with instructions to admit and consider this evidence. An arbitrator could well rule differently on the basis of such evidence; indeed, the company itself might well re-evaluate the situation on that basis.

C. The Award is Arbitrary and Capricious.

It is axiomatic that conclusions not supported by the record are arbitrary and capricious and will be set aside on appeal. The fundamental issue was whether Mrs. McLendon's use of the Blue report was fraudulent and deliberately deceitful because she knew it belonged to the Fine Arts Commission but did not obtain the Commission's permission to use it; or whether she honestly and reasonably believed that it belonged to Mrs. Chatham, in which case her use of it, with Mrs. Chatham's undisputed authorization, could not be considered fraudulent or deliberately deceitful. The Post believed the former and fired her on the basis of that belief. In effect, as shown in Section 3 plaintiff's statement of facts, the arbitrator concurred in the Post's view of her conduct.

Plaintiff has stated there are no facts in the record to support the arbitrator's conclusion in this respect and that all the facts in the record bearing on that issue support the contrary view that Mrs. McLendon was victimized by Mrs. Chatham. Plaintiff has listed in Section 3 of its Statement of Material Facts all the facts which support that latter

view. Since it is difficult to prove a negative (i.e., that there are no facts to support the arbitrator's conclusion), the court can only rely upon its own reading of the record, on whatever response may be put forward by the defendant company and upon the analysis below of the basis on which the arbitrator reached some of his challenged conclusions.

(a) It was important to know whether or not Mrs. McLendon could reasonably have regarded the Prospect House report as a handout, in which case it would be something she could use, by way of paraphrase or even, in some measure, verbatim, without attribution. Such a finding would greatly diminish, if not entirely extinguish, her offense. Certainly it would remove the element of fraud, especially in view of the impossible time limits imposed on her. Mrs. McLendon stated she considered it a handout and gave reasons based on her reportorial experience for thinking so. The arbitrator, after stating that *none* of the *Guild* witnesses gave testimony on this point (Award, p. 19), then concludes that Mrs. McLendon could not reasonably have regarded it as a handout. (Award p. 26). But the arbitrator entirely fails to consider the fact that James Reston, the New York Times Editor called by the *company* as an expert witness, testified without qualification that he regarded the report on Prospect House as a handout. (Tr. 361).

(b) The arbitrator found Mrs. McLendon "acted very improperly . . . in her failure to secure permission to use the report from the persons authorized to grant such permission." (Award, p. 26). This, of course, is an oblique finding that she knew the report had been prepared by or for the Fine Arts Commission. It is a critical finding in that it tends to support the view that Mrs. McLendon was deliberately deceitful in her use of the report. Yet, there is no evidence to support this finding; all the evidence—as we have shown—supports the opposite conclusion.

(c) The arbitrator also finds she "acted very improperly . . . in her failure to inform her editors of the circum-

stances under which she secured the report as well as the conditions attached by Mrs. Chatham to its use." This, of course, is the equivalent of finding that the circumstances were so suspicious that it was bad faith and dishonesty on Mrs. McLendon's part not to disclose them. But all the facts in the record support the contrary view that there was nothing suspicious at all about the circumstances under which Mrs. McLendon came into possession of the document. The arbitrator's finding on this point is not based on any fact in the record, but is entirely the product of his own suspicion which, under the circumstances and in view of the evidence, is wholly unwarranted.

In connection with this contention of arbitrariness, we urge the court to examine pages 25 and 26 of the Award where the arbitrator, on the basis of the sheerest speculation and suspicion, raises all sorts of doubts about Mrs. McLendon's good faith, not one of which is based on any fact in the record. Indeed, for *every* suspicion and doubt he expresses, there is, as we have previously noted, a factual and persuasive explanation.

If, as plaintiff asserts, the record does not support the view that Mrs. McLendon's use of the Blue report was a deliberate fraud, then the arbitrator's findings and conclusions in that regard must be set aside. In that event, the very basis for the company's imposition of the discharge penalty falls, for it is clear, from its own argument, that the company chose the drastic penalty of discharge because it believed her guilty of deliberate fraud. Under these circumstances, the court should set aside the Award and reinstate Mrs. McLendon to her position with back pay and seniority rights unimpaired.

D. The Defendant's Accord and Satisfaction Argument.

Defendant contends that when Mrs. McLendon accepted the severance pay due under the Award, she in effect accepted the award and surrendered her right to appeal its

validity to this court. Defendant bases this argument on the fact that, following the Award and prior to the filing of this action, there was a dispute over the amount due as severance pay because of a disagreement over the length of Mrs. McLendon's service. The parties met and resolved this dispute by compromise. That compromise, defendant argues, was an accord and satisfaction which constituted not only an agreement as to the amount of severance but also (apparently by implication) an agreement not to appeal the validity of the Award to this court. The argument is frivolous.

An accord and satisfaction is a form of contract. When, for example, there is a genuine dispute as to the amount of money owed by one party to another and one party accepts a certain sum in full settlement, or payment, or satisfaction, he cannot thereafter challenge the amount he received. The reason he cannot thereafter challenge the amount is simply that, in his compromise settlement (his accord and satisfaction) that is precisely what he agreed to do, i.e., surrender any future challenge. That was the specific intent of the contract.

But that is not what happened in this case. There was not even discussion, much less agreement, on surrendering the right to challenge the award in court. The *only* thing the parties discussed was the amount of severance pay and the only thing they agreed upon was the amount of severance pay. In effect, defendant would now read into that agreement a provision never even discussed, i.e., that the union and the grievant would surrender the right to challenge the validity of the award. Contracts are not constructed out of whole cloth.

Indeed, as shown by the accompanying affidavit of attorney Ira M. Lechner, "at the conference (of the parties) I informed Mr. Kennelly (Post labor relations director) that the Guild was studying the Arbitrator's Award for the purposes of appeal to this Court and both Mr. Kennelly and

I agreed that the conference (on the severance pay dispute) was without prejudice to our respective legal positions."

The single case relied upon by the defendant has no bearing on the matter. In *Layton v. Self Mfg. Co.*, 244 F. Supp. 178, 359 F.2d 715, an arbitrator entered an award in favor of a union against an employer. Thereafter the District Court entered an order enforcing the award. The District Court retained jurisdiction to determine the amount of back pay due under the award, in the event the parties were unable to reach agreement on that amount. However, the parties did reach agreement and then entered into a stipulation setting forth the agreed amount and agreeing that the company would withdraw its pending petition for certiorari and the union would dismiss with prejudice the District Court case. Later, a group of employees sought to set aside the dismissal of the case, apparently in order to challenge the compromise settlement in back pay. The court in turn rejected their effort. Obviously, where parties agree, as they *specifically* did in the *Layton* case, to abandon both the effort by the union to enforce and the effort by the company to challenge an award, based upon their settlement of the underlying claim, then no future challenge can be made. But in *Layton*, there was specific agreement not to challenge the award, supported by a quid pro quo. Those are not the facts here.

To hold that Mrs. McLendon or the union lost the right to challenge the award because the company paid and she accepted the severance pay would be the equivalent of holding that a party who pays a judgment in District Court loses the right of appeal on the theory that payment of the judgment constitutes acceptance of the judgment, and a waiver of the right to challenge it on appeal.

The dispute in this case is not over how much the Post owed Mrs. McLendon; it is over the justness of her discharge. The severance pay is only an incident to that discharge. If the Award is set aside by this court and Mrs.

McLendon is reinstated to her job, she of course would be required to restore the severance to the company, just as a party who prevails on appeal is entitled to get back the money judgment he paid to the other party in the trial court.

Respectfully submitted,

SPELMAN, LECHNER & WAGNER

By

Seymour J. Spelman
Attorney for Plaintiff

January 13, 1969

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * *

**Statement of Material Facts as to Which No Genuine Issue
Exists Submitted in Support of Cross-Motion for Summary
Judgment by Plaintiff Washington-Baltimore Newspaper
Guild Local 35**

This case involves the discharge of Mrs. Winzola McLendon from the employ of The Washington Post on October 19, 1967. Mrs. McLendon had been a reporter for The Washington Post for more than thirteen years, principally in the women's department, and her performance record over that entire period was unblemished. She enjoyed an excellent reputation among respected figures in the local newspaper, radio and television world for "trustworthiness", "honesty" and "integrity" and was widely regarded as an "honest, reliable competent reporter and person." Except for the events leading up to the discharge, there was no evidence put into the record derogatory to Mrs. McLendon's professional or personal reputation, her ability as a newspaper reporter, her honesty, or the quality of her performance as a veteran employee of the Post.

On October 19, 1967, she was fired by Benjamin C. Bradlee, Managing Editor of the Post. In a letter to Mrs. McLendon dated October 26th, Mr. Bradlee said: "... you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism."

This letter was written in response to the request of the Washington-Baltimore Newspaper Guild (plaintiff and hereafter called "the Guild") which on October 20th had moved to submit the discharge to arbitration. In its letter of October 20th to the American Arbitration Association invoking arbitration (with copy to the Post), the Guild stated:

"Under the terms of Article XVII and Article VI paragraph 3 of The Washington Post-Guild contract, the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a women's page reporter, for 'gross misconduct' to arbitration.

"The alleged misconduct involves an unproved charge of plagiarism against Mrs. McLendon. The Guild maintains that the discharge was not for good and sufficient cause."

A. The Events Leading To The Discharge.¹

Mrs. McLendon was scheduled to leave on vacation on Monday, September 4, 1967, and Saturday, September 2nd, was her last work day before the vacation. On week days, she did general reporting in the Women's Section; on Saturdays, she served as editor of the Women's Section (Tr. 434-35). Her regular day off (in addition to Sunday) was Thursday.

On Monday or Tuesday of that week (August 28 or 29), the Women's Editor, Miss Marie Sauer, asked her to do a

¹ The facts are based on the findings of the Arbitrator in his Award and on undisputed testimony in the record. The Award is in evidence as defendant's Exhibit D. The Transcript of the arbitration hearing is submitted herewith as plaintiff's Exhibit A.

story on Prospect House, an historic Georgetown house, for publication on September 10th. This was to be a "big story", in color, on the front page of the Women's Section. Mrs. McLendon explained that she "didn't really have the time" to do such a story on Prospect House because of the press of other work she had to complete before leaving on vacation. (Tr. 439-40). The response of Miss Sauer was: "I know this, and I realize it, but we don't have anybody else to send, and you will just have to do it, and do it the best you can within the time that you have." (Tr. 439-40).

The owner of Prospect House, Mrs. Patricia Chatham, was available for interview only on Thursday, Mrs. McLendon's normal day off. Miss Sauer told Mrs. McLendon to shift her day off to Wednesday, rejecting (for budgetary reasons) Mrs. McLendon's request to work both days (Wednesday and Thursday) so that she would have more time to do the Prospect story and also complete her numerous other assignments.

In his Award, the Arbitrator makes the following findings regarding this time pressure imposed on Mrs. McLendon: "According to that testimony, which was not disputed by the Publisher, Mrs. McLendon did not begin writing the Prospect House story on Saturday until about noon . . . She estimated that she had no more than three hours on Saturday 'at the very most' to do the story . . . Even assuming that she had an hour or two more, it seems to me crystal-clear that it was impossible for her to do the kind of job described by the authorities at The Post as their standard within the available time. Mr. Wiggins [Editor of the Post who participated in the discharge decision] spoke² of a 'creative product' and 'original research.' He stated: 'I would expect [the reporter] to look up the relevant literature. . . .' It can scarcely be contended that within the space of three to five hours it would be possible

²Mr. Wiggins was a witness for the Post at the arbitration hearing to support its decision to discharge Mrs. McLendon for "gross misconduct." The above quotations in the Award are excerpts from his testimony.

'to look up the relevant literature' covering the history of a 150-year old house, of its numerous occupants (all or most of whom were quite obscure), of any interesting peripheral material (e.g., famous guests), and write a 1500-word feature story. Not only could not Mr. Wiggins's research standards³ be conformed to in so short a time-span, but even the preliminary task of sorting out names and dates could scarcely be accomplished, let alone the writing . . . It is, of course, impossible to say what kind of story Mrs. McLendon would have written if she had had more time." (Award, pp. 27-28).

Within those time limitations found to be "impossible" by the arbitrator, Mrs. McLendon interviewed Mrs. Chatham at Prospect House on Thursday, August 31st. In response to Mrs. McLendon's questioning, Mrs. Chatham revealed that she had had prepared a complete inventory of the house furnishings, with prices, which she permitted Mrs. McLendon to peruse but only after insisting that the existence of the inventory not be disclosed as the source of Mrs. McLendon's information, for, in her words, "my attorney would kill me if I showed it to anybody." (Tr. 447).

Mrs. McLendon, not having the time to do her own research, then asked Mrs. Chatham if she had a "handout or fact sheet" recounting the history of the house. (Tr. 449). Mrs. McLendon knew from her own experience as a reporter that many persons with "big homes, like Mrs. Merriweather Post . . ." have such historical fact sheets. Mrs. Chatham handed her a 17 page typewritten document con-

³ With respect to this "original research" standard of Mr. Wiggins, Mr. James Reston, New York Times Editor called as a company expert witness, was asked on cross-examination: "Is the reporter expected normally to do an original job of research?" He answered: "No, that is not expected. You would never get the paper out if you did that, obviously." Miss Isabel Shelton, White House reporter for The Washington Evening Star, put it this way: ". . . It's nice to say I would go to the library and look it up, but we don't work that way; we don't have that time. . . Ideally that would be great, but you are not writing a Ph.D. thesis; you are writing under highly fast-breaking conditions. . . ." (Tr. 493-494).

cerning Prospect House [attached hereto as Exhibit B] which Mrs. McLendon regarded as "just an ordinary hand-out."⁴ Mrs. Chatham said: "I will let you see it, if you won't mention it . . ." and Mrs. McLendon responded: "All right, I won't." Mrs. Chatham further said: "Feel free to use it, but just don't refer to it."

Mrs. Chatham at first did not want Mrs. McLendon to take the document from the house because, she said, it was her only copy; but she finally did permit it on Mrs. McLendon's promise to return it in a few hours. As Mrs. McLendon read the document back at her desk at the Post, she saw for the first time, at the bottom of page 15, the following words "Prepared by Joan R. Blue (Mrs. William L.)." She had never heard of Mrs. Blue and "thought it was somebody Mrs. Chatham paid to do this for her," just as Mrs. Merriweather Post has employed a researcher to prepare a fact sheet on her home. In fact, in similar circumstances, Mrs. McLendon had once been told by a homeowner not to mention the name of the person who had prepared the historical brochure because "I paid her for this. This is mine." (Tr. 451).

At this time, Mrs. Chatham was trying to sell Prospect House and its furnishings for two million dollars, and, with respect to her direction to Mrs. McLendon not to mention the document as the source of her information, Mrs. McLendon conjectured that, just as in the case of the inventory, Mrs. McLendon "didn't want people knowing she had gone to the expense to have her house written up."⁵

⁴ James Reston, the New York Times editor, testified: "I would assume that it [the 17 page document on Prospect House] was a hand-out from just reading it, yes." (Tr. 361). Isabel Shelton, who covers the White House for the Washington Star, testified it is customary to receive a hand-out when covering a famous place like a home or a park. (Tr. 481). Both thus corroborated Mrs. McLendon's testimony in this respect.

⁵ Mrs. McLendon's interpretation of Mrs. Chatham's motive was a reasonable one, for a document prepared by or at the expense of the owner under such circumstances could be regarded as more commercial than historical. As noted hereafter, Mrs. Blue herself testified that Mrs. Chatham was using the report solely to promote the sale of her house.

As noted earlier, Mrs. McLendon wrote the piece on Prospect House in the three hours available to her on Saturday, September 2nd, and then left on a month's vacation. She based the story on the interview with Mrs. Chatham; newspaper clippings in the Post's files, her own knowledge of the house and on the 17 page historical fact sheet (hereafter called the Blue report) provided by Mrs. Chatham. The story was, by Mrs. McLendon's own admission, a "hack job", because it had to be done in such a hurry.

A portion of the story—described by the Arbitrator as "substantial"—came from the Blue material. Some was copied verbatim. [See Exhibit C where the verbatim copying has been underlined in red]. Some were quotations of quotations used in the Blue report. [See Exhibit D where these quotes of quotes are underlined in red].⁶ Some was a paraphrase of the Blue report. [See Exhibit E where this paraphrasing is underlined in red]. In accordance with Mrs. Chatham's direction, Mrs. McLendon did not mention the Blue report in the story nor did she ascribe any of the verbatim or paraphrased or quoted material to Mrs. Blue.

The material which Mrs. McLendon used from the Blue report has been separated into the four categories described in Exhibits C, D, E and F (Verbatim copying, Quotes of Quotes, Paraphrasing, or Matters of Historical Fact, and Quotes in Hard Copy (i.e., as written by Mrs. McLendon) dropped by Editor because these different uses of the ma-

⁶ In some of these quotations, the person (Louise Oettinger) who edited Mrs. McLendon's original ["hard"] copy, dropped the quotation marks from Mrs. McLendon's copy. See Exhibit F where this material is underlined.

terial must be separately evaluated on the issue of the propriety of their use.⁷

The story was published on September 10th. On October 10th, Mrs. Blue wrote to the Post protesting Mrs. McLendon's use of the Blue report without crediting the Fine Arts Commission, for which Mrs. Blue stated she had prepared the report, or without obtaining its permission. [Blue's letter attached hereto as Exhibit G]. At the time she wrote the story, Mrs. McLendon had not been informed that the report had been prepared for the Fine Arts Commission and nothing in the document itself indicated that it had been prepared for anyone other than Mrs. Chatham, the owner of the house.

In her letter to the Post, Mrs. Blue also stated: "I realize that Mrs. McLendon obtained a copy of our survey from the present owner of Prospect House, [Mrs. Chatham] who

⁷ The company's own expert witnesses James Reston and Louise Oettinger, as well as Guild witnesses testified that:

(a) Paraphrase of hand-out material without any attribution is permissible journalistic practice and is widely utilized throughout the industry (R. 59, 142, 200-205, 209-210, 212-217, 224, 226-227, 228-229, 267, 344-346, 360, 362, 367, 368, 377, 399-401, 405-406, 483-484 and Union Exhibits);

(b) Quoting of hand-out material without attribution to the particular source (e.g., "floating quotes"; Captain McCauley said; legend has it; etc.) is permissible journalistic practice and is widely utilized throughout the industry, though at worst such practice is confusing or sloppy (R. 37-39, 56-59, 60, 128-130, 137-138, 228, 294-296, 331-332, and Union Exhibits);

(c) Quoting material which is itself quoted within the hand-out, without attribution to the hand-out but with attribution to the original source (e.g., a newspaper article appeared during the time accusing the State Department of staging "propaganda parties," etc.), is permissible journalistic practice (R. 104-105, 137-138, 219-220, 224-225, 226, 333-334);

(d) Verbatim usage of factual or historical hand-out material without attribution to the extent utilized by Mrs. McLendon (as distinguished from "marking up" a press release or the wholesale lifting of an entire release) is permissible journalistic practice and is a practice that is widespread throughout the industry (R. 69, 341-344, 349-350, 364-365, 368, 402-406, 489-494, and Union Exhibits).

probably encouraged Mrs. McLendon to use its contents as if they were her own."

Mrs. Blue testified that, a month or so prior to the McLendon story, a copy of her report on Prospect House had been given to Mrs. Chatham who, without advising Mrs. Blue or the Fine Arts Commission, made it available to the New York Times which ran a story on August 4 based in part on this material. The Fine Arts Commission, through Mrs. Blue, complained to the New York Times and Mrs. Blue then called Mrs. Chatham and "told her we were very surprised to find this, and we hoped she would not give this out in the form we gave it to her again, because it was unpublished, and it was against the policy of the Commission to do this." (Tr. 78). In connection with the McLendon story, Mrs. Blue acknowledged that neither she nor the Fine Arts Commission discussed the matter with Mrs. Chatham before writing its letter of complaint to the Post.

Mrs. Blue further testified she believed Mrs. Chatham had "encouraged [Mrs. McLendon] to use the contents as if she, Mrs. Chatham, owned the report" and had done so "to promote the sale of her house." (Tr. 82).

Mrs. McLendon then met with Mrs. Blue, in the presence of Mrs. Helen Dudman, Executive Editor of the Women's department, Mrs. McLendon told Mrs. Blue: "Mrs. Chatham gave this to me as a handout, and that is what I thought it was." Mrs. Blue replied: "I don't doubt that. She's done this to us before. All that woman wants to do is sell her house." Mrs. McLendon then said: "Mrs. Blue, I think your fight is with Mrs. Chatham", and Mrs. Blue responded: "I know that, but the fact remains you used this." (Tr. 471-476).

Mrs. McLendon, through Guild counsel, made strenuous efforts to secure the testimony of Mrs. Chatham at the arbitration hearing, but, on advice of counsel, she refused to

appear, and, under D. C. law, there is no power to compel her appearance.⁸

During Mrs. Blue's testimony, Guild counsel sought to introduce evidence to prove that virtually all of the Blue report itself had been copied verbatim or had been paraphrased from historical materials, but, on objection from Post counsel, the Arbitrator refused to admit this evidence on the ground (in his words): "It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica." (Tr. 87). The prejudicial error underlying this ruling is treated at a later point.

Mr. Bradlee, the Managing Editor, after comparing the Blue report with Mrs. McLendon's story, consulted with Mr. Wiggins, the Editor, and then, as he stated in his letter of October 26th, discharged Mrs. McLendon for "gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism."

In making this decision, the Post acknowledged that it did not take into account that, as the Arbitrator found, "it was impossible for her to do the kind of job described by the authorities at The Post as their standard within the available time"; (Tr. 189; Award p. 27), nor did it consider it relevant that Mrs. Chatham, the owner of Prospect House and the apparent owner of the document describing the house, had authorized her to use the material freely but not to attribute it to the document which she had furnished to Mrs. McLendon. (Tr. 32). Mrs. McLendon was discharged for "gross misconduct" because, in the company's view, she had committed "a major and serious act of plagiarism" by using substantial portions of the Blue report without attribution or credit to Mrs. Blue or the Fine Arts Commission.

In the company's words in its brief to the Arbitrator: "The Company contends that such use was gross miscon-

⁸ See Affidavit of Ira M. Lechner, an attorney for the Guild, attached as Exhibit H. Under D. C. law, there is no power of subpoena in private arbitration.

duct, constituting plagiarism (pp. 7-8) . . . Mrs. McLendon made fraudulent use of a substantial and material part of Mrs. Blue's report . . . It is undisputed that she did not have permission of the author . . . Mrs. McLendon, in compliance with the condition laid down by Mrs. Chatham, made no mention of the Blue report in her article, and gave no credit to her source."⁹ (Tr. 10).

B. The Scope of the Issue Submitted to Arbitration; the Prejudicial Refusal to Hear Material Evidence; and the Arbitrariness of the Award.

The Arbitrator rejected the company's contention that Mrs. McLendon was guilty of gross misconduct. But he then went on to hold that her behavior nevertheless provided "good and sufficient cause" for discharge and sustained the discharge on that basis. It is the contention of plaintiff [argued in the Memorandum of Points and Authorities submitted herewith] that the Arbitrator's authority was limited to determining the question of whether Mrs. McLendon was guilty of "gross misconduct", the sole ground on which the company based and defended its discharge decision; that when he answered that question, as he did, in the negative, his authority ended; and that he therefore exceeded his authority in going on to uphold the discharge on the ground of "good and sufficient cause." It thus becomes necessary here to set forth the facts relating to the scope of the issue which was submitted to the Arbitrator.

1. The Scope of the Issue Submitted to the Arbitrator.

The contract between the Guild and the Post [submitted as Exhibit A by defendant in its Answer] provides in Arti-

⁹ It should be noted again, at this point, that the undisputed evidence shows that Mrs. Chatham did not inform Mrs. McLendon that the Blue document had been prepared for the Fine Arts Commission and that the document itself did not disclose this fact. Also, the undisputed evidence shows that Mrs. Chatham made no mention of Mrs. Blue, and that when Mrs. McLendon later saw Mrs. Blue's name at the end of the document, she believed her to be a person who had been paid to prepare the document for Mrs. Chatham.

cle VI(3) that "No employee shall be discharged except for good and sufficient cause." In the instant case, the good and sufficient cause assigned by the company in discharging Mrs. McLendon was "gross misconduct" for committing "the act of plagiarism."

The company's first statement of the grounds of discharge was made orally by Mr. Bradlee, Managing Editor, directly to Mrs. McLendon at the time of discharge (October 19th). He informed her she was discharged for "gross misconduct." (Tr. 22-23).

Next, in a letter to Mrs. McLendon on October 26th, Mr. Bradlee repeated the grounds of discharge in these words: "... you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in the Washington Post on September 10, 1967, you committed the act of plagiarism."

In the letter to the American Arbitration Association submitting the discharge to arbitration, the Guild defined the issue as follows: "... the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a women's page reporter, for 'gross misconduct' to arbitration."

In his opening statement at the arbitration hearing, Post counsel put the issue in these words: "Mrs. McLendon was discharged for gross misconduct in that in the preparation of an article published on September 10, 1967, she committed the act of plagiarism. The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement." (Tr. 4).

Throughout the hearing, the company continued to put the issue solely in terms of "gross misconduct."

Thus: "It is the Post's position that, in preparing the article on Prospect House, Mrs. McLendon committed a major and serious act of plagiarism in using Mrs. Blue's

report without permission or attribution of any kind, and that this constituted, and warranted discharge for gross misconduct." (Tr. 10).

The Editor of the Post (J. Russell Wiggins) stated: "I think it (Mrs. McLendon's use of the Blue document) is certainly an act of gross misconduct of a kind which I think irremediable except by discharge." (Tr. 97). And later: "... it certainly constituted a piece of gross misconduct." (Tr. 131).

In defining the issue for purposes of eliciting the opinion of Dr. Earl F. English, dean of the School of Journalism, University of Missouri, as to the justification for the discharge, Washington Post counsel expressed it as follows:

"Dr. English, in your opinion, as a teacher and as an active manager in the newspaper industry, would you regard the plagiarism that you observed in these two documents [i.e., the McLendon story and the Blue report] as grounds for discharge for gross misconduct?" (Tr. 166)¹⁰

Throughout its post-hearing brief submitted to the Arbitrator, the Post continued to define the issue and justify the discharge solely on grounds of "gross misconduct."

Thus, on page 6 of the brief [Exhibit 1] the company states that "she was discharged for gross misconduct." On page 7, "The company contends that such use (of the Blue document) was gross misconduct constituting plagiarism. . . ." On page 8 (footnote) the company states: "Under the applicable contract . . . , the discharge was for gross misconduct, and its justification depends upon the appropriate evaluation of all the pertinent facts involved in Mrs. McLendon's actual use of the Blue report in her article."

¹⁰ Dr. English had been called as an expert witness by the Post. (Tr. 156). He had been asked a series of questions leading up to the ultimate opinion question set forth above. (Tr. 156-166). The arbitrator sustained objection to the question as not a proper subject for expert opinion. (Tr. 166).

On page 9, the company defines the offense as "gross misconduct for a fully experienced professional journalist, justifying discharge. . . ." On page 13, it states that "both Mr. Wiggins and Mr. Bradlee deem it gross misconduct."

At no time prior to the arbitration hearing or during the arbitration hearing or in its post-hearing brief to the arbitrator did the Post seek to define the issue or justify the discharge on the alternative ground that, even if Mrs. McLendon's misconduct were not deemed "gross", she was still guilty of a form of misconduct which (though lesser in degree) nevertheless also justified discharge for "good and sufficient cause." On the contrary, the Post made it clear in its brief that, in determining to discharge Mrs. McLendon, it did so because it considered the misconduct gross, not ordinary, the plain implication being that it would not have imposed such a severe and drastic penalty as discharge if the misconduct had not been gross. Thus, on page 17 of the brief, the Post states: "That this is not an ordinary form of misconduct for an employee is self-evident." And on pages 17-18: "It is the status of Mrs. McLendon as a fully experienced, seasoned reporter that makes her fraudulent use gross misconduct."

Finally, on page 31, the company clearly rejected the notion that it was seeking to defend the discharge before the arbitrator on any ground less than gross misconduct. It stated: "... she has engaged in gross misconduct. . . ." and "There is no evidence in this record which alters or mitigates the serious degree and character of Mrs. McLendon's conduct."¹¹

¹¹ If the company had been asking the Arbitrator to sustain the discharge even if he found evidence which mitigated the "serious degree" of the offense, it would obviously have argued that alternative ground at this point in the brief. The statement quoted in the text above, however, is patently inconsistent with such argument and indicates clearly that the company considered the only issue to be "gross misconduct", the sole ground assigned for the discharge.

Not only did the company define the issue and defend the discharge solely in terms of "gross misconduct", but the Guild, in trying the case, treated the issue in the same fashion. (See Exhibit J, Guild brief, at pages 4, 12 and 13).

At one point, for example, at the end of the second day of the three-day hearing—after the Guild had put in its basic exhibits—Guild counsel then stated to the Arbitrator:

"This is what we maintain should be the basis for deciding whether or not Mrs. McLendon was justifiably discharged for gross misconduct." (Tr. 391).

In his award, the Arbitrator agreed with the Guild and held that the Post was not justified in discharging Mrs. McLendon for "gross misconduct." But, he then went on to hold that, in his opinion, the Post was justified in discharging her on the lesser ground of "good and sufficient cause", a ground (as noted above) never asserted by the company as justification for the discharge and never presented to the Arbitrator for consideration, either at the hearing or in the company's brief.

The *first and only* occasion on which the company has made the argument that the alternative issue of "good and sufficient cause" had also been submitted to the Arbitrator is in its "Memorandum of Points and Authorities, etc." submitted in connection with the present motions in this litigation.

On pages 9 and 10 of that Memorandum, the company states: "Mrs. McLendon could have been dismissed by the Company only for 'good and sufficient' cause under Article VI(3). But the contract also confers on the company the right to dismiss for 'willful neglect of duty or gross misconduct'—each more serious offenses. . . . Both discharge issues were submitted to the arbitrator, and both were clearly determinable by him under the provisions of the contract."

The question for this Court is: Were both discharge issues (i.e., gross misconduct, or if not, then good and sufficient cause) submitted to the Arbitrator, as the company now claims for the first time or was only one issue (gross misconduct) submitted, as the union claims?

2. *The Refusal To Hear Material Evidence.*

Plaintiff contends the matter should be remanded to the Arbitrator for his prejudicial refusal to admit certain material evidence. The relevant facts on this contention are the following.

The company fired Mrs. McLendon for gross misconduct on the asserted ground that she "committed a major and serious act of plagiarism." (Tr. 10). The company stated at the outset of the arbitration hearing that "the legal definition of plagiarism is the appropriating of somebody else's property without permission and using it as his own, and *that is the definition of plagiarism we are dealing with.* ..." (Emphasis added). (Tr. 61). And it placed in evidence (Tr. 4) the definition of plagiarism from Black's Law Dictionary, Page 1308, 4th Edition, 1951: "PLAGIARISM: The act of appropriating the literary composition of another, or parts or passages of his writings, or the ideas or language of the same and passing them off as the product of one's own mind."

Plagiarism was the central issue and, as the company stated, the legal definition is the definition "we are dealing with."¹²

Some of the material within the Blue report (Exhibit B) is placed within quotation marks. Where Mrs. McLendon used any of that material, she retained those quotation

¹² As the Arbitrator stated in his Award (p. 9): "In urging that the dismissal of Mrs. McLendon for gross misconduct be sustained, the Publisher describes the issue as basically one of plagiarism—'the fraudulent copying of a material and substantial portion of the literary product of another.'"

marks.¹³ (Exhibit D). Most of the material in the Blue report, however, does not appear within quotation marks, and where Mrs. McLendon used some of that material verbatim, she did not enclose it within quotation marks. (Exhibit C).

The Guild sought to introduce evidence which would have shown that most, if not all, of this material in the Blue report which appears without any quotation marks had nevertheless been copied verbatim by Mrs. Blue from historical sources. The purpose of such evidence was to demonstrate that: (1) Mrs. McLendon, in using such material, was not guilty of the offense for which she had been fired, i.e., "appropriating the literary composition" of Mrs. Blue (since it was not in fact Mrs. Blue's composition);¹⁴ (2) The material was historical and in the public domain and thus its use was not plagiarism; (Tr. 550-552) and (3) in any case, even assuming the worst, a "piracy of a piracy" is not plagiarism.

The Arbitrator refused to allow the evidence, on the ground that (in his words): "It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica." (Tr. 87).

3. *The Arbitrariness of the Award.*

Plaintiff also contends the Award should be set aside because it is arbitrary and capricious in that major con-

¹³ However, the editor (Louise Oettinger) who edited Mrs. McLendon's copy, dropped some of these quotation marks in the published story, thus indicating that Post management itself did not consider this lack of attribution as improper at all, much less "gross misconduct." (See Exhibit F).

¹⁴ This point (i.e., that the material in the Blue report was historical and not Mrs. Blue's literary composition) was particularly significant since the company felt that the gravamen of Mrs. McLendon's offense was the fact that she copied "from a single *non-historical* and *non-public* source (i.e., Mrs. Blue's) (Exhibit I, Company Brief, p. 22. Italics in original). In the mind of Bradlee who fired her, the critical fact was McLendon had used Mrs. Blue's "creative effort", Mrs. Blue's "own words." (Tr. 229). And the Arbitrator himself, in reaching his decision, assumed that these were "Mrs. Blue's own words." (Award p. 18, 3rd paragraph).

clusions have no support in the record. The facts set out below relate to that contention.

The Post fired Mrs. McLendon because it believed "that Mrs. McLendon knew that the Blue report was prepared for the Fine Arts Commission and that, notwithstanding this, she made no effort to secure permission from Mrs. Blue or from the Commission to use the report." (Award, p. 9). Thus, it concluded that her use of the material was "massive deceit" with no conceivable justification, and therefore amounted to "the fraudulent copying" of the "literary product" of Mrs. Blue. (Award p. 9). As the company stated it: "The ultimate question . . . is whether there has been a material and substantial use of another's literary product *in a dishonest, fraudulent, manner.*" (Exhibit I, Company Brief, p. 14) (Emphasis added).

The Guild, on the other hand, contended that Mrs. McLendon reasonably concluded that Mrs. Chatham was the lawful owner of the report and therefore could, as she did, authorize Mrs. McLendon to make full use of it. The Guild also contended that Mrs. McLendon reasonably believed that Mrs. Chatham, for understandable reasons of her own, did not wish to disclose that she had had the report prepared. (Exhibit J, Guild Brief, pages 1 and 2).

Thus, the issue was drawn: The Post considered her guilty of fraud, justifying discharge for gross misconduct, whereas the Guild considered her guilty, at most, of poor journalistic practice which, especially because of the impossible time pressure, did not justify discharge for gross misconduct. The Post recognized that this distinction between fraud and poor practice was critical to the case, saying: "While at times difficult, fraud and poor journalistic practice must be differentiated." (Award p. 10).

The Arbitrator in effect sustained the Post's invidious view of Mrs. McLendon's conduct, finding she acted "very improperly"—"in her failure to make attribution in the article itself, in her failure to secure permission to use

the report as well as the conditions attached by Mrs. Chatham to its use." (Award p. 25). He further found that "she could [not] reasonably have regarded the report as a handout owned by Mrs. Chatham and which Mrs. Chatham could rightfully make available to reporters to be used as they saw fit subject to the condition that no reference to the document be made in their stories." (Award, p. 26).

Plaintiff states it flatly that there were no facts, none at all, in the record to support any of these above conclusions of the Arbitrator. All facts in the record bearing on these issues support the opposite conclusion, namely, that Mrs. McLendon was not guilty of deliberate deceit but was the victim of Mrs. Chatham's misrepresentations and of the unreasonable time limit imposed by the Post which made her Prospect House job impossible.

The facts in the record supporting that opposite conclusion (i.e., the conclusion that Mrs. McLendon reasonably relied on Mrs. Chatham's authorization and was therefore not guilty of fraud are the following:

(a) Mrs. McLendon had not been informed that the report on Prospect House had been prepared for the Fine Arts Commission and nothing on the document itself indicated that it was prepared for anyone other than Mrs. Chatham. And Mr. Bradley who fired her did not know one way or the other whether Mrs. McLendon knew the report had been prepared for the Fine Arts Commission. (Tr. 232).

(b) Mrs. McLendon had no cause to be suspicious of Mrs. Chatham's ownership of the report on Prospect House and Mrs. McLendon knew from experience that many owners of such historic homes have such historic reports prepared for them, sometimes with the name of the researcher appended to the report.

(c) Mrs. Chatham did not mention Mrs. Blue to Mrs. McLendon and when Mrs. McLendon saw Mrs. Blue's name, for the first time, as she read the report back at the Post,

she believed her to be someone Mrs. Chatham had paid to prepare it.

(d) Mrs. Chatham had given out this report once before under similar circumstances, and Mrs. Blue herself believed she had done so, on that previous occasion as well as in the McLendon situation, solely to promote the sale of Prospect House. Mrs. Blue had no doubt Mrs. Chatham had told Mrs. McLendon to use the material freely as though it belonged to Mrs. Chatham, and had so advised the Post both in her original letter of complaint to the Post as well as during a subsequent interview with Mrs. Dudman, the Executive Editor of the Women's Section.

(e) Mrs. McLendon, like Mrs. Blue, also believed Mrs. Chatham had in mind the promotion of the sale of her house when she gave her the report on the house and because of that belief, it was understandable to Mrs. McLendon that Mrs. Chatham would not want to have it known that such report was the source of Mrs. McLendon's information. For this reason, Mrs. Chatham's direction not to attribute to the report did not arouse suspicion in Mrs. McLendon's mind.

(f) James Reston, New York Times editor, called as an expert witness by the company, corroborated Mrs. McLendon by testifying that he too would regard the Blue report as a handout which it would be permissible to paraphrase (as Mrs. McLendon did) and, to a point, to use verbatim without quotes or attribution (as Mrs. McLendon did).

(g) Miss Isabel Shelton, Washington Star reporter at the White House, corroborated Mrs. McLendon that it is customary to receive handouts when covering places like historic homes.

There are no facts in the record in contradiction of or inconsistent with the above.

/s/ SEYMOUR J. SPELMAN
Seymour J. Spelman
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Order

This cause came on to be heard on motion of the defendant for summary judgment and on cross-motion of the plaintiffs for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, affidavits, exhibits thereto and points and authorities in support of and in opposition to said motions, and after oral argument by counsel for the respective parties, and upon consideration thereof, it appearing that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law, it is by the Court this 9th day of June, 1969,

ORDERED that the motion for summary judgment filed by the defendant herein be and the same is hereby granted and that summary judgment be entered for defendant dismissing the complaint; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment be and the same is hereby denied.

June 9, 1969

/s/ AUBREY E. ROBINSON, JR.
Judge

No objection as to form:

SEYMOUR J. SPELMAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**Motion Under Rule 60(b), Federal Rules of Civil Procedure, To
Vacate Order Granting Summary Judgment and Remand
Case for New Arbitration Hearing**

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, plaintiff, Washington-Baltimore Newspaper Guild, acting in behalf of its member, Winzola McLendon,

whose discharge by defendant was upheld in arbitration, hereby moves the Court to vacate the final Order entered in this cause on June 9, 1969, sustaining the arbitration award and remand the case for a new arbitration hearing, on the ground, as more fully set forth in the accompanying Statement of Facts (with supporting affidavit) and Points and Authorities, that certain critical evidence not legally available to plaintiff at the time of the arbitration hearing, has just now become available and, when considered by the arbitrator, could entirely reverse the outcome of the arbitration of the McLendon discharge. In view of the critical nature of the now available evidence and in view of the circumstances surrounding its non-availability at the original arbitration hearing, Rule 60(b)(6) requires the vacating of the Order of June 9, 1969, and the remand for a new hearing.

Plaintiff hereby requests oral argument on this motion because of the rather complex facts and the grave nature of the issue underlying the motion, namely, the lifetime professional career of Mrs. McLendon.

WASHINGTON-BALTIMORE NEWSPAPER
GUILD, LOCAL 35

By SEYMOUR J. SPELMAN
Seymour J. Spelman
Counsel

SPELMAN, LECHNER AND WAGNER
902 Warner Building
Washington, D. C. 20004

By SEYMOUR J. SPELMAN
Seymour J. Spelman
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Statement of Facts in Support of Motion Under Rule 60(b),
Federal Rules of Civil Procedure

A. Statement of the Case.

On April 18, 1968, Arbitrator Emanuel Stein issued an Award sustaining the discharge of Mrs. Winzola McLendon by defendant Washington Post Company. [*Award*, attached to complaint as Exhibit A.]

On July 11, 1968, plaintiff union filed the complaint in the instant case, asking this Court to vacate the arbitration award on several grounds, one of which was that there was inadequate factual support for certain of the arbitrator's basic findings discussed hereafter and, for that reason, the award was arbitrary and capricious. Both parties thereafter filed motions for summary judgment, and on June 9, 1969, this Court entered an order granting defendant's motion and denying plaintiff's motion, thereby sustaining the arbitration award. On July 7, 1969, plaintiff filed a Notice of Appeal.

On September 18, 1969, plaintiff filed in the Court of Appeals a "Motion to Enlarge Time for Filing Appellant's Brief" on the ground that, "Within the past 48 hours, there has come to the attention of undersigned counsel certain significant newly discovered evidence" within the meaning of Rule 60(b), F.R. Civ. P. which, "if true, would in the opinion of undersigned counsel constitute clear grounds" for setting aside the final order of this Court and remanding the case for a new arbitration hearing. By this motion, plaintiff's counsel simply sought time to verify through affidavit the new evidence, stating that if such verification were achieved, a further motion would be filed to hold the appeal in abeyance while plaintiff filed a motion under Rule 60(b) in the trial court. [Motion to Enlarge Time for Filing Appellant's Brief, attached hereto as Exhibit 3.]

Defendant opposed plaintiff's motion, principally on the contention that Rule 60(b) does not apply to a proceeding involving an arbitration award. On October 10th, the Court of Appeals granted appellant's motion [Exhibit #4].

On October 14th, plaintiff filed a "Motion to Hold in Abeyance the Filing of Appellant's Brief", on the ground that plaintiff's counsel had now completed his investigation of the new evidence and intended to file a Rule 60(b) motion in the trial court, for counsel had "obtained an affidavit encompassing the newly discovered evidence which, in his view, is material and substantial within the meaning of Rule 60(b)". [Exhibit #5] Defendant opposed this motion, largely on the ground that plaintiff was taking too much time in filing the Rule 60(b) motion in the trial court.

On November 6, 1969, the Court of Appeals directed plaintiff to "file a statement . . . indicating whether or not he has filed a motion under Rule 60(b) in the District Court and, if not, when such motion will, in fact be filed. Further consideration of appellant's motion [to hold filing of appellant's brief in abeyance] will be deferred pending the filing of the aforesaid statement".

In response thereto, on November 11, 1969, plaintiff filed its "Statement of Appellant Pursuant to November 6, 1969, Order of This Court", explaining that a serious professional emergency unrelated to the instant case had delayed the preparation and filing of the Rule 60(b) motion, but that it would be filed no later than December 5, 1969. [Exhibit #6]

B. Statement of the Facts.

Mrs. Winzola McLendon, a 13-year employee of defendant Washington Post, was fired for gross misconduct on October 19, 1967, on the ground that, in the preparation of an article on an historic Georgetown mansion called Prospect House, she had committed an act of plagiarism

by her use of certain typewritten material prepared by a Mrs. Blue for the Fine Arts Commission (hereafter referred to as the Blue report). As stated by the arbitrator, defendant contended that Mrs. McLendon's use of the Blue report had been fraudulent and deliberately deceitful, because it believed "that Mrs. McLendon knew that the Blue report was prepared for the Fine Arts Commission and that, notwithstanding this, she made no effort to secure permission from Mrs. Blue or from the Commission to use the report." [Arbitrator's Award, at page 9, in evidence as Exhibit A, attached to the original complaint.]

Plaintiff, on the other hand, contended that there was no fraud or deceit involved in the use of the Blue material. Plaintiff argued that Mrs. McLendon had been given the Blue report by Mrs. Patricia Firestone Chatham, owner of Prospect House, during a private interview; that Mrs. McLendon did *not* know that the report had been prepared by Mrs. Blue for the Fine Arts Commission; that Mrs. McLendon had been specifically authorized by Mrs. Chatham to use the Blue report without attribution; and that the circumstances surrounding Mrs. Chatham's authorization were such that Mrs. McLendon reasonably believed that Mrs. Chatham (who was the owner of Prospect House) was the lawful owner of the report on Prospect House and therefore could properly authorize Mrs. McLendon to make full use of it.

Thus, a central issue in the arbitration of the discharge was whether Mrs. McLendon's use of the Blue report was (as the defendant contended) fraudulent and deliberately deceitful because she knew it had been prepared by Mrs. Blue for the Fine Arts Commission but did not obtain the Commission's or Mrs. Blue's permission to use it; or whether (as plaintiff contended) she honestly and reasonably believed that it belonged to Mrs. Chatham, the owner of Prospect House, in which case her use of it, with Mrs. Chatham's authorization, could not be considered fraudulent or deliberately deceitful.

In sustaining the discharge, the arbitrator concluded that Mrs. McLendon had "acted very improperly" in the following four respects: (1) "In the character and extent of the utilization of the Blue report"; (2) In her failure to make attribution [to Mrs. Blue or the Commission] in the article itself; (3) In her failure to secure permission to use the report from the persons [i.e., Mrs. Blue and the Commission] authorized to grant such permission; and (4) In her failure to inform her editors of the circumstances under which she secured the report as well as the conditions attached by Mrs. Chatham to its use". [Award, at page 25] Thus, in three out of his four basic conclusions upholding the discharge [namely, (2), (3) and (4) above], the arbitrator sustained the defendant's view that, in using the Blue material, Mrs. McLendon had acted fraudulently and with deliberate deceit because she knew the report had been prepared for the Commission by Mrs. Blue but nevertheless made no effort to secure their permission to use it.

Plaintiff's counsel had made strenuous efforts to induce Mrs. Patricia Firestone Chatham, the owner of Prospect House, to testify at the arbitration hearing, but, on advice of her counsel, she declined to do so. And inasmuch as there is no power of subpoena in a private arbitration in the District of Columbia, plaintiff's counsel were unable to compel her testimony.

Plaintiff's counsel had interviewed Mrs. Chatham prior to the arbitration hearing and hoped she would consent to testify because her testimony in the view of said counsel would have supported plaintiff's contention (1) as to Mrs. Chatham's authorization of the use of the Blue report by Mrs. McLendon without attribution; (2) as to the circumstances surrounding that authorization; (3) as to the reasonableness of Mrs. McLendon's belief that Mrs. Chatham owned and had the right to authorize the use of the report on her house; and (4) as to Mrs. McLendon's lack of knowl-

edge of the Fine Arts Commission relationship to the report on Prospect House. [See affidavits of Mrs. Chatham and Mr. Lechner, mentioned above.]

Without Mrs. Chatham's testimony, there was no one except the discharged employee (Mrs. McLendon) to testify on these vital points, for the conference between Mrs. Chatham and Mrs. McLendon, at which these events occurred, had been a private one. Thus, since Mrs. Chatham's appearance could not be compelled by subpoena, plaintiff was compelled to arbitrate the discharge without her critical testimony and Mrs. McLendon was deprived of an absolutely essential witness and thus denied a full hearing on the merits.

Now, however, Mrs. Chatham is ready, willing and able to come forward voluntarily and testify in the manner set forth in her affidavit, attached hereto as Exhibit #1. As she states in that affidavit, on advice of her counsel, she had refused the request of plaintiff's counsel to testify at the arbitration hearing, but that she is "now ready, willing and able to testify" in Mrs. McLendon's behalf, regretting that she had rejected the original request of plaintiff's counsel.

Mrs. Chatham, a distinguished citizen of the District of Columbia, who has no personal interest in this matter except that, in her words, she wants "the full truth to be known", will (as her affidavit shows) testify in such a manner as to demonstrate the validity of the critical contentions of plaintiff outlined above which, being without *any* independent evidentiary support at the original hearing, were rejected by the arbitrator. Thus, as her affidavit shows, Mrs. Chatham will testify:

1. That Mrs. Chatham considered that she had "every right to permit Mrs. McLendon to use the material in the report for the preparation of her article for the Washington Post".

2. That Mrs. Chatham "did not tell Mrs. McLendon that the report had been prepared by Mrs. Blue or that it had been prepared for the Fine Arts Commission, and there was nothing on the copy [which she furnished to Mrs. McLendon] . . . which contained any mention of the Fine Arts Commission".

3. That Mrs. Chatham authorized Mrs. McLendon "to feel free to use it in any way she desired but not to refer to the report itself".

4. That Mrs. Chatham did not mean to mislead Mrs. McLendon and, if she did so, greatly regrets it.

5. That Mrs. Chatham "can very well understand, on the basis of what [Mrs. Chatham] said to [Mrs. McLendon] on that day, that [Mrs. McLendon] left [Mrs. Chatham's] home with the feeling that the report belonged to [Mrs. Chatham] and that she was free to use it, provided she did not refer to the report as such in her article".

And that is precisely what Mrs. McLendon proceeded to do—for which she was subsequently discharged by the defendant on the belief that just the opposite occurred than what Mrs. Chatham is now ready and willing to testify. Now, for the first time, Mrs. Chatham is willing to come forth and set the record straight.

The critical nature of this testimony of Mrs. Chatham, now available for the first time, is obvious, for it directly contradicts several of the principal conclusions on which the arbitrator based his award. Thus, as noted above, the arbitrator held that Mrs. McLendon "could [not] reasonably have regarded the report as a handout owned by Mrs. Chatham and which Mrs. Chapman could rightfully make available to reporters to be used as they saw fit . . ." [Award, page 26]; and on that basis, he found therefore that Mrs. McLendon acted "very improperly . . . in her failure to secure permission to use the report from the persons authorized to grant such permission [i.e., Mrs.

Blue and the Fine Arts Commission]". [Award, page 25]

Plaintiff, on the basis of that evidence, now available for the first time, is asking this Court, under Rule 60(b), to vacate its order of June 9, 1969, and to remand the case for a new arbitration hearing in order that the testimony of Mrs. Patricia Firestone Chatham can be taken and the evidence as a whole then be re-evaluated in light of that testimony. The legal argument in support of this motion is set forth in the Points and Authorities attached hereto.

/s/ SEYMOUR J. SPELMAN
Seymour J. Spelman
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**Points and Authorities in Support of Motion Under Rule 60(b),
Federal Rules of Civil Procedure**

In support of its motion, plaintiff advances the following legal argument:

1. The relevant portion of Rule 60(b) on which plaintiff bases its motion reads as follows:

"(b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . ; (4) the judgment is void; (5) the judgment has been satisfied, etc. . . . ; or (6) *any other reason justifying relief from the operation of the judgment.* [Emphasis added] The motion shall be made within a reasonable time, and

for reasons (1), (2) and (3) not more than a year after the judgment, order or proceeding was entered or taken.”

2. More specifically, plaintiff is relying upon the underlined subsection (6) of paragraph (b), namely, “any other reason justifying relief from the operation of the judgment”. Initially, as indicated by its papers filed in the Court of Appeals, plaintiff had thought in terms of proceeding under subsection (2) of Rule 60(b)—newly discovered evidence—but further research into the meaning of “newly discovered evidence” indicates that it is not applicable to the present situation. Here, the testimony of Mrs. Chatham is not newly discovered, in the literal sense, but rather “newly available”. In these circumstances, the relevant subsection is (6) which—in the words of Professor Moore—is the “grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clause [i.e., clauses (1) through (5)], or when it is uncertain that one or more of the preceding clauses afford relief . . .” *Moore's Federal Practice*, Volume 7, 60.27[2], at page 308.¹ Or, as stated in Barron and Holtzoff: “This broad language [of (6)] gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice”. Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, Sec. 1329 at page 417.

3. Rule 60(b) is required to be “liberally construed, in order that judgments may reflect the true merits of the case”. Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, Sec. 1322, at page 392. As our Court of Appeals has stated it: “In our opinion, Rules 55(c) and 60(b) should be given a liberal interpretation”. *Barber v.*

¹ *Klaprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266; *In Re Cremidas' Estate*, 14 F.R.D. 15; *Pierre v. Bernuth, Lembecke Co.*, 20 F.R.D. 116; *Bridoux v. Eastern Airlines Inc.*, 93 U.S. App. D.C., 369, 214 F.2d 207; *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 243; *U.S. v. Williams*, 109 F. Supp. 456, 461; *Badack v. Norwegian America Line Agency, Inc.*, C.A. 2d 1963, 318 F.2d 538, 542.

Turberville, 94 U.S. App. D.C. 335, 218 F.2d 34. And in *Bridoux v. Eastern Airlines, Inc.*, 93 U.S. App. D.C. 369, 214 F.2d 207, the Court declared that Rule 60(b) "does bring to bear a more liberal attitude than pertained before its adoption" and that "the 'other reason clause' of Rule 60(b) [on which plaintiff relies] . . . enables a court to vacate a judgment whenever such action 'is appropriate to accomplish justice'".²

4. In applying this principle of liberal construction, the courts have held that, under Rule 60(b)(6), a judgment should be set aside where, for reasons outside his control, plaintiff did not have an opportunity to present all facts available to support his position and therefore has been denied an opportunity to have his case decided on the merits after a fair and full hearing. Thus, *In Re Cremidas' Estate*, 14 F.R.D., the court, relying on Subsection (6) of Rule 60(b), vacated an order and remanded the cause for a new hearing to receive evidence which, through no fault of plaintiff, was not available to be presented the first time around. In doing so, the court stated in words directly pertinent here:

"Most recent cases applying the rule with which we are here concerned have uniformly held for its liberal construction so that any case presenting the question of substantial rights should be resolved in favor of the petition to set aside a judgment where a litigant has not been afforded an opportunity to have his case decided on the merits. *Tozer v. Chas. A. Krause Milling Co.*, 189 F.2d 242. Under this principle, a litigant is entitled to a fair hearing which presupposes an opportunity to present all the facts available in support of

² See also:

In Re Cremidas' Estate, 14 F.R.D. 15: "Most recent cases applying the rule with which we are here concerned have uniformly held for its liberal construction . . .". To the same effect: *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863; *Tozer v. Chas. A. Krause Milling Co.*, 189 F.2d 242; *Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531.

his position. [Emphasis added.] . . . The power vested in the courts under Rule 60(b)(6) is sufficient to enable them to vacate judgments wherever such action is appropriate to accomplish justice. *Klaprott v. U.S.*, 335 U.S. 601, 69 S. Ct. 384."

To the same effect is *Patapoff v. Vollstedt's, Inc.*, 267 F. 2d 863, where, under Rule 60(b)(6), the court vacated a judgment because, through no fault of her own, plaintiff did not put in certain evidence during the hearing. The court remanded the case for a new hearing to give plaintiff the opportunity to present this evidence.

5. These principles are especially applicable to the instant situation and require that the court grant the motion, vacate its order of June 9, 1969, and remand the case for a new arbitration hearing. Through no fault of her own, plaintiff was unable to present at the arbitration hearing the testimony of Mrs. Patricia Firestone Chatham. Mrs. Chatham refused the request of plaintiff's counsel to appear, and her appearance could not be compelled, because subpoenas are not available in private arbitration proceedings in the District of Columbia. Mrs. Chatham is now ready, willing and able to testify, and immediately upon the verification by affidavit of her willingness to testify and of the substance of her testimony, plaintiff moved to halt the pending appeal and to prepare and file this motion.

As noted in the Statement of Facts, filed herewith, Mrs. Chatham will testify on one of the critical and central issues of the case, namely, whether Mrs. McLendon's use of the Blue report was (as defendant contended) fraudulent and deliberately deceitful because she knew it belonged to the Fine Arts Commission but did not obtain the Commission's permission to use it; or, whether (as plaintiff contended), Mrs. McLendon honestly and reasonably believed that it belonged to Mrs. Chatham, the owner of

Prospect House, in which case her use of it, with Mrs. Chatham's authorization, could not be considered fraudulent or deliberately deceitful.

Mrs. Chatham's testimony will, as her affidavit shows, strongly and unequivocally support plaintiff's contention. There was *no* testimony on this critical issue available to plaintiff at the arbitration hearing except the self-serving testimony of Mrs. McLendon which the Arbitrator rejected. Thus, the sole independent witness to these central factors is now available to testify, and her testimony will support plaintiff's contention which had been rejected by the Arbitrator.

6. The test for vacating a final order under Subsection (6) of Rule 60(b) is stated by Professor Moore in these words: ". . . clause (6) should be liberally applied to situations not covered by the preceding five clauses, so that, given due regard to the sound interest underlying the finality of judgments, the district court, nevertheless, has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice." *Moore's Federal Practice*, Vol. 7, 60.27[1]. Mrs. Chatham's testimony obviously meets this test, for it goes directly to a critical issue in the case and directly contradicts the finding of the arbitrator on that issue. And, it is "of such a material and controlling nature as would probably induce a different conclusion." [*Moore's Federal Practice*, Vol. 7, 60.23[4].]

7. Moreover, "the discretion (in vacating a judgment under Rule 60(b)) should ordinarily incline towards granting rather than denying relief, especially [as here] if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. Equitable principles may be a guide in administering relief." *Baron & Holtzoff, 3 Federal Practice & Procedure*, Section 1323, at p. 253. In the instant case, the denial of a new hearing would be grossly unfair and prejudicial to Mrs.

McLendon, whereas the grant of same would be no more than an inconvenience to defendant. In such circumstances, the discretion of the Court should be exercised in favor of a new hearing. Moreover, the denial of a new hearing would allow Mrs. McLendon to be the victim of a serious inadequacy in due process in arbitration in the District of Columbia, namely, the absence of subpoena power to compel testimony. It is within the power of this Court to cure that inequity in the instant case, and, in view of all the surrounding circumstances, that power should be exercised.

8. In these circumstances, Rule 60(b)(6) plainly entitles plaintiff as a matter of law to a new arbitration hearing. A lifetime professional career is at stake in this case, and a failure to give plaintiff an opportunity to have Mrs. Chatham's testimony admitted and considered would amount to a failure to afford her a full and fair hearing on the merits and thereby result in a gross miscarriage of justice.

Respectfully submitted,

/s/ SEYMOUR J. SPELMAN
Seymour J. Spelman
Counsel for Plaintiff
902 Warner Building
Washington, D. C. 20004

November 26, 1969

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**Points and Authorities in Opposition to Plaintiff's Motion
Under Rule 60(b) Fed.R.Civ.P., and in Support of Motion
For Judgment on the Pleadings**

I

The reason advanced by the Plaintiff for setting the arbitrator's award aside and remanding it for the purpose of a new arbitration is not a reason justifying relief from the operation of a final labor arbitration award under applicable labor law; hence, it is not reason for this Court to set aside its judgment herein under Rule 60(b) Fed. R. Civ. P.*

The part of Plaintiff's motion that asks this Court to reopen its Order of June 9, 1969 may be brought by the Plaintiff under Rule 60(b) Fed. Rules of Civ. P., but that part of the Motion in which Plaintiff asks this Court to remand an arbitrator's award to an arbitrator for the purpose of hearing newly discovered evidence or any other evidence must be brought under Section 301(a) of the Labor-Management Relations Act, as amended, 29 U.S. C.A., Sec. 185(a), the same as its original complaint. Nowhere in any pleadings of the Plaintiff including its Complaint has it ever identified the jurisdiction of this Court to review an arbitrator's award in a labor case, and because of this Plaintiff's argument has always been disoriented and disassociated from controlling federal law of labor arbitration. In its 1957 *Lincoln Mills* decision, the Supreme Court held that Section 301 of the Taft-Hartley Act not only opened the doors of the federal district courts for the enforcement of arbitration clauses in collective bargaining contracts, but also requires the federal courts to fashion a body of substantive law to apply in resolving

* The Plaintiff's request for relief in its Motion is elusive. It says, "... Rule 60(b)(6) requires the vacating of the Order of June 9, 1969 [District Court Order], and the remand for a new hearing." Remand of what? Rule 60(b) does not apply to final arbitration awards.

these cases. *Textile Workers v. Lincoln Mills*, 40 LRRM 2113, 353 U.S. 448. There is no way under federal labor law under Section 301(a) of the LRMA for a court to remand a case to an arbitrator in a case such as this.

Despite its repeated denial in its motions for time extension to file brief in the Circuit Court of Appeals for the District of Columbia that it uses Rule 60(b) in a double sense, the Plaintiff is doing just that. The Plaintiff seeks to be relieved from the June 8, 1969 final Order of this Court by reason of a claim made under Rule 60(b) although such claim is clearly even under Rule 60(b) without merit. But the Plaintiff also wants Rule 60(b) to be used by the Court to set aside the finality of an arbitrator's award because of alleged newly discovered evidence (availability) as though it were the same as final judgment of this Court subject to Rule 60(b). This the Court cannot do. An arbitration award under a labor contract is not a final judgment of this Court. The kind of review open to a Court under Section 301 LMRA is severely limited. *United Steelworkers of America v. Enterprise Wheel and Car Co.*, 363 U.S. 593; *Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U.* (9th Cir. 1969) 412 F. 2d 899; *Gulf States Telephone Co. v. Local 1692*, ... F. 2d ... (5th Cir., August 10, 1969) 72 LRRM 2026; *Safeway Stores v. American Bakery and Con. W.I.U.*, 5th Cir., 340 F. 2d 79. It is for this reason that Defendant has opposed an extension of time to file briefs in the Court of Appeals because it believes the Plaintiff's supporting reason to be spurious. Had the Plaintiff simply asked for an extension of time to file brief, that would be one thing, but the grounds upon which the Plaintiff predicated the justification for a time extension had to be vigorously resisted as contrary to fundamental labor arbitration law. Even so, as long as the Union presented its motion to the Court of Appeals for an expansion of time on the basis of truly newly discovered evidence (as it steadfastly maintained in several papers) it at least had the virtue that something came up after the arbitration was held that the Union knew nothing

about. In labor arbitration discharge cases, nothing is more common than the fact that employees with knowledge of the case will not testify, particularly for the employer against a fellow employee. To say a party may await the outcome of such an arbitration and then persuade another witness to testify is the antithesis of labor arbitration policy under § 301 LMRA. It is also common in discharge cases where outsiders are involved, to appeal to the sympathy of such persons to try to help out in some way after an arbitration is lost. There would be no end to discharge arbitration if final awards were reopened for something other than something that went wrong in the arbitration itself.

The Plaintiff, in its Points and Authorities, cites numerous civil procedure cases to the effect that Rule 60(b) permits the vacation of a judgment after final order of a court. But Plaintiff cites no controlling law under Sec. 301(a) of the LMRA. The District Court did not fail to consider any evidence of any kind in any kind of trial in which it participated as a Court. Plaintiff simply joins together as the same thing the grounds for vacation of a court order with the grounds for setting aside an arbitrator's final award under a collective bargaining agreement.

The Union's brief is barren of any labor arbitration cases in which an arbitrator's award was vacated because the Union wanted to call another witness. The whole body of federal labor arbitration law is to the contrary. A party cannot have a new arbitration for any reason, absent "fraud and corruption, etc." * *where the arbitrator has rendered an unambiguous award within his authority.*

* Thus in *United Electrical, E. and M. Wks. v. Star Expansion Ind., Inc.*, 246 F. Supp. 400, 1964, S.D.N.Y., the U.E. sought to interfere with an arbitration in progress. The Court said: "To thrust upon the courts, as U.E. wishes, a matter already decided by the arbitrator would be productive of delay and confusion and impair the federal policy in favor of arbitration." See Section 10 of the United States Arbitration Act, 9 U.S.C. § 10, and The New York Arbitration Law, New York, C.P.L.R. § 7511. Both statutes strongly repel the motion of judicial review of arbitral decisions except in unusual cases, like fraud, corruption, etc.

The issue presented by the Plaintiff's motion may be empirically stated:—what has the arbitrator done wrong in reaching his decision that warrants the Court to set it aside and to order a new arbitration; the body of arbitration law fashioned by the Courts since *Lincoln Mills* supra, is clear that the Plaintiff, because he is dissatisfied with the results of an arbitration, cannot retry it on another theory or basis.** Was the award procured by fraud? Did the arbitrator exceed his authority? Did he deprive the Appellant of a fair hearing by anything he did? Did he grossly misconduct himself? Did he fail to give Plaintiff a chance to introduce any evidence that it had? Did he act capriciously or arbitrarily? Then what did he do wrong that justifies setting aside his award? Was the award ambiguous? Did it leave any computations for further determination?

The additional testimony (whatever it is worth) was evidence which could have been submitted to the arbitrator in this arbitration under the grievance submitted, and if it was not done, it is not the fault of the arbitrator, the Defendant, or this Court. Under the rules of the AAA (see, Defendant's Statement, supra, p. 3), as well as labor law, once the arbitration hearing is closed, that ends the hearings as far as the submission of additional evidence, and in the absence of fraud or misconduct on the part of the arbitrator in his denying a fair hearing the award of the arbitrator based upon that evidence is final and binding. The issue arising out of this Motion can be further stated as follows: Did the parties when agreeing that disputes over the interpretation of a collective bargaining

** If the persuasive powers on Plaintiff's and Grievant's side (see Aff. Ira Lechner attached to Plaintiff's Statement) are more persuasive after it has gone to hearing and observed the outcome, that is not ground to set an award aside. Anyway, as discussed elsewhere there is nothing in the affidavit which in any way contradicts or brings in question any findings and conclusions of the arbitrator made on the basis of Mrs. McLendon's own testimony or her conversation with Mrs. Chatham.

agreement shall be decided by final and binding arbitration, also agree that after an arbitrator has rendered a final decision either party can ask that the award be set aside on the ground that it had not presented its entire case?

It is clear in federal labor arbitration that a claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then shift his ground, trial strategy or presentation of its case, and want a second opportunity to present its case in a second proceeding.* See, *Ficek v. Southern Pacific Company*, 338 F. 2d 655 (9 CA) 1964, cert. den. 380 U.S. 988. To the same effect that a union or an employer cannot *re-arbitrate or relitigate* matters which were or could have been the subject of a submission to an arbitration, see *Ficek v. Southern Pacific Company*, 338 F. 2d 655 (9 CA) 1964, cert. den. 380 U.S. 988; *Rogers v. Allied Aviation Service*, 315 F. 2d 518 (2nd Cir. 1963), cert. den. 375 U.S. 847; *Reeves v. Tarvizian*, 351 F. 2d 889 (1st Cir. 1965); *Panza v. Armco Steel Corp.*, (W.D. Pa. 1962) 208 F. Supp. 50, aff'd 316 F. 2d 69, cert. den. 375 U.S. 897; and see *Bower v. Eastern Airlines*, 214 F. 2d 623 (3rd 1954); *Woolley v. Eastern Airlines*, 250 F. 2d 86, (5th Cir. 1957).

In the foregoing cases the Union sought a new trial by going into court as compared with asking for a second arbitration. It was clear that if it could do that it would be able to restructure its case and present new witnesses. This, the courts have said, cannot be done.

In a recent decision, *Union Hardware Division v. Local 247, I.U.E.*, decided February 8, 1968, 67 LRR M2541, ... F. Supp. ..., the court concluded the arbitration had resolved all questions that were properly before the arbi-

* In its statement in support of its motion, Plaintiff, in effect, seeks to change the issue in the arbitration to make it more hospitable to Mrs. Chatham's affidavit. See *La Valle Plaza, Inc. v. E.S. Noonan, Inc.*, below, P. 8.

trator and that ended the matter. In denying a union's request for further arbitration, the court said:

"Recently in *Standard Chlorine, Inc. v. Leonard*, 384 F. 2d 304, 305 (2d 1967), Circuit Judge Kaufman made the following observation:

'Arbitration is often thought of as a quick and efficient method for determining controversies. Unfortunately, cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration.'

"As this case suggests, he might have added that piecemeal submission to an arbitrator of each bifurcated branch of a dispute is also a cause of delay. Arbitration is supposed to produce a speedy resolution of labor-management disputes." (Emphasis supplied).

In *Bridgeport Rolling Mills Company v. Brown*, 314 F. 2d 885, (2d Cir. 1963) cert. denied 375 U.S. 821 an employer moved to vacate an adverse labor arbitration award on the ground of alleged newly discovered (available) evidence on the basis of Rule 60(b), Fed. R. Civ. P., and fraud in the procurement of the award, U.S.C. 9, U.S.C. Sec. 10(a) with affidavits in support of its motion.

The employee's motion for judgment on the pleadings and the employer's affidavits was granted.

The employer, the losing party in the arbitration, claimed to possess evidence "uncovered" after the arbitration award which conclusively established the employee's complicity in a theft and rendered his testimony before an arbitrator perjurious. The employer claimed "sufficient" evidence was now available to justify a discharge.

In a per curiam opinion, the court did not bother to get into the question of Rule 60(b) or that the courts cannot

consider the merits of evidence in arbitration matters. The court stated categorically, that whatever other good the newly available evidence might do the employer in some other proceeding such as a proceeding for conversion of property, as far as labor arbitration is concerned,

“We only hold that the parties, having agreed to arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator.”

The judgment on the pleadings was affirmed.

The rationale concerning the finality of arbitration awards has been well stated in *La Valle Plaza, Inc. v. R. S. Noonan, Inc.* 378 F. 2d 569 (3rd Cir. 1967).

“It is an equally fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration. The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.* The continuity of judicial office and the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator, although even here the vast increase in the arbitration of labor disputes has created the office of the specialized professional arbitrator. This policy of finality, founded on practice considerations, is nourished by the primitive view of the solemnity of all judgments. From it, reinforced by the enormous fines which King Edward II levied to replenish his treasury on his judges for erasing or altering their records,

came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." * Court's footnote omitted.

Only if the *award* is ambiguous may a Court remand it, and then solely to correct the ambiguity.

A colorful expression of the principle favoring finality to arbitration awards can be found in the observations of Judge Weinfeld in *Goldstein v. Doft*, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd. per curiam*, 353 F. 2d 484, *cert. denied*, 383 U.S. 960. In dismissing a claim before him which sought re-arbitration of a dispute which had previously been arbitrated and decided adversely to the plaintiff, Judge Weinfeld said, 236 F. Supp. at 734:

"To permit this suit to be maintained in the face of incontrovertible facts would make a shambles of the doctrine of *res judicata*—intended not only for the protection of litigants, but also in the interest of the State—indeed, it would give the plaintiff 'two bites of the cherry.' "

The Union yesterday (18 months ago) submitted its case voluntarily to the arbitrator and closed the hearing as far as introduction of evidence was concerned. Today it relies upon a different concept of its evidence for a request of a new arbitration after getting the results in a final fully reasoned 29-page decision and award. And tomorrow it could claim that it will be at liberty to rely upon still another "equitable" ground under Rule 60(b) to upset the final arbitrator's award. It is respectfully submitted that this court should simply put Rule 60(b) aside and hold that the Defendant is not obligated by the terms of the agreement to arbitrate to submit a grievance to final arbitration and then be required to reopen the arbitration for the taking of further evidence once the final award has

been made in the absence of fraud or gross misconduct by the arbitrator.*

Since the duty to arbitrate is of a contractual nature and is not a matter subject to Rule 60(b) like a court case, the courts have concluded that once parties agree to the finality of an award, a court does not have authority to consider whether one side or the other properly or improperly submits its case to the arbitrator, whether it well or poorly structured its strategy, or how and when it used its "persuasive" powers to produce its witnesses in the one arbitration. A court neither agrees or disagrees with the employer or union that additional evidence warrants or merits consideration by any one. It simply does not remand such a case. What the Union is here seeking is another "bite of the cherry." Its claimed grievance has been subjected to the full arbitral process, and thereafter accorded judicial review under Section 301(a) LMRA. No less than the employer, the Union is no doubt unhappy when it loses in the arbitration.

II

National labor policy favors the speedy and final resolution of the myriad problems that come up in day to day administration of collective bargaining agreements. It is for this reason that the finality and binding quality of labor arbitration has a decisiveness not found even in judicial proceedings. Arbitration is a consensual matter, and the parties do not agree that rules like 60(b) of the

* "Since *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972, the district courts are empowered under § 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185 to decree specific performance of an agreement to arbitrate a grievance dispute. *Brass and Cooper Workers Federal Labor Union, etc. v. American Brass Company*, 7 Cir., 272 F.2d 849. *But since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. Local 1912, International Association of Machinists v. United States Potash Company*, 10 Cir., 270 F.2d 496." *Independent Petroleum Workers v. Standard Oil Co.*, 275 F.2d 706, 709. (Italics supplied).

Fed. R. of Civ. P. will have any application to the grounds upon which a new arbitration may be ordered by a court because an arbitration is not a judicial trial. Newly discovered evidence, or newly available evidence, may be grounds in a judicial proceeding for a new trial *by the Court in the Court*, but these are not grounds for the vacation of an arbitrator's award and the ordering of an arbitration back to an arbitrator with the implication that he may set aside his findings and conclusions. If an arbitration award is set aside, the Court does not order a new arbitration. It is gone. The Court merely determines it is void. If the Court does not vacate it, then it does not remand it on the merits of the award. Only in the case of an ambiguity, requiring clarification in the *order*, can it be remanded for correction or clarification.

An arbitrator's award that is rendered within his authority can be remanded *only* if the award is ambiguous or incomplete, or indefinitely rendered. If there has been gross misconduct, it is set aside. The Plaintiff does not ask that. If the award is not ambiguous, the work of the arbitrator is at an end, and his authority is *functus officio*. See, *La Valle Plaza, Inc.* *supra*. His relation to the case is at an end.* No one would be more surprised than Arbitrator Stein, who is an experienced and highly regarded arbitrator, to learn that 18 months after he has finished with an unambiguous award, a court has ordered him to reopen the case for any reason. In *Todd Shipyards*, the losing party asked for a second arbitration for a different

* By way of illustration of the absurdity and vice of the Union's contention, should it be possible to secure a second arbitration through no fault in the conduct of the first, the arbitrator could potentially reverse his prior decision and award reinstatement and back pay. Thus by reason of the delay in bringing the witness around to testify, the employer could be assessed back pay from the date of discharge to the end of the second arbitration. This could be a long time from now in view of the continuing litigation. Should the Union say that the arbitrator might not do that, the point is the arbitrator could, and it is not for the court to tell him what he can or cannot do, any more than it is for the court to tell him how to look at evidence.

reason than the first. The Court said, 242 F. Supp. 606, 612:

"An award of an arbitrator acting within the scope of his authority has the effect of a judgment and is conclusive as to all matters submitted for decision at the instance of the parties. *Panza v. Armco Steel Corp.* 316 F. 2d 69 (3rd Cir. 1963); See 5 Am. Jur. 2d, Arbitration and Award, § 147. Moreover, finality of disposition of a grievance by arbitration is what the parties here contemplated by express provision in the labor agreement.

Consonant with the limitation on the power of the Court to interfere with any determination of the arbitrator reasonably reached on the merits of a grievance, remand to the arbitrator is appropriate where there is reasonable ground for disagreement as to what he actually did decide . . ."

It is for reasons such as these that the Court in *Todd Shipyards v. Industrial U. of Marine and Ship Wkrs.*, 242 F. Supp. 606, D.N.J. (1965) said that national labor policy would be sorely frustrated if parties disappointed with the result of an arbitration plus afterthought would seek a second arbitration. The court in *Todd* gave voice to this very concern in the following language, 242 F. Supp. at 611:

"Counterbalancing the liberal policy favoring arbitration is the policy favoring finality of arbitration awards. The harmony sought by arbitration is a substitute for work stoppage and elimination of industrial strife between labor and management could be jeopardized if repetitive submission to arbitration of the same grievance was permitted. Unless there is finality to an arbitration award as contemplated by the parties, there would be no inducement to accept a provision for arbitration in the labor agreement."

In *Metal Product Workers Union Local 1645 v. Torrington*, 358 F.2d 103 (2d Cir. 1966) the Court in denying a union's request to set aside an arbitrator's award, concluded:

"We can perceive no reason for giving it this second opportunity, since there is no basis for finding error either in the arbitrator's conclusions or in the proceedings by which he reasoned those proceedings." 358 F.2d at 106.

III

The Plaintiff has clearly entangled itself in the merits of the arbitrator's award, the credibility of witnesses and the weight of testimony. It is asking this Court to do the same. What is the Plaintiff saying to the Court? It has a witness it would like to have testify after the arbitrator's analysis and evaluation of the evidence has been publicized in a fully reasoned decision and award. The Plaintiff says it could not persuade this witness to testify before, but now that she sees that the grievant has lost the arbitration, some 18 months later, she would like to try to help her. What else is the Plaintiff saying to the Court? It asks the Court to take a look at the proposed testimony:—it is right there in Mrs. Chatham's affidavit and it is fully evaluated on its merits (or demerits) by Plaintiff for the Court. See, Plaintiff's Statement p. 5 to 8.*

The arbitrator has already concluded from *Mrs. McLendon's own testimony* that Mrs. Chatham did not give her permission to use the written report without attribution. Arbitrator's Decision, P. 4. The Court cannot get

* It is not clear precisely what the Union is saying. Mrs. Chatham's testimony, as we read what the Plaintiff says about it, is that Mrs. Chatham authorized Mrs. McLendon to commit plagiarism. But the affidavit does not support that conclusion. Even if it did it would be flatly contrary to grievant's own testimony on the point as finally evaluated by the arbitrator and he cannot change his findings. See, Arbitrator's award, p. 4. This observation is made only to show the futility of asking the Court to consider questions of evidence in any way.

into the merits of the case and even if it were to do so, it is Defendant's position that there is nothing in Mrs. Chatham's affidavit which contradicts the findings of the arbitrator.

When the Plaintiff cites *Moore's Federal Practice*, (Plaintiff's Points and Authorities, p. 6) to the effect a court may act under Rule 60(b) "*when the evidence is of such a material and controlling nature as would probably induce a different conclusion,*" (italics supplied), the Plaintiff is clearly asking the Court to look at the merits of the case as though it were trying the issue that was in arbitration. The District Court is not the judge of the arbitration. As Judge Brown said in *Safeway Stores v. American Bakery and Con. W.I.U. Local 111*, (5th Cir. 1968) 390 F. 2d 79, 84, "The arbiter was chosen to be Judge. The Judge has spoken. There it ends."

Moore's Federal Practice may be quite right when Moore is talking about a judicial trial, but Moore is not talking about a labor arbitration.

What we see at page 5 of the Union's "Statement" is the discussion of the merits of the whole arbitration. If the Court will look at this, the Plaintiff says it will agree to its materiality and surely order a new arbitration. Although the Plaintiff will say that it doesn't want the court to consider the merits, how else can the Court review the "evidence" and, in this kind of situation, thus indicate to an arbitrator that it believes the evidence to be material? That is clearly an involvement in the merits of a case and the courts have so stated. In *Todd Shipyards*, supra, the Court said:

"But the power to remand should not be exercised unless there is patent ambiguity in the decision of the arbitrator or the text of it is not germane to the issue presented as reflected by the record of the proceedings before him. To remand under any other circumstances would be to suggest to the arbitrator that the Court

differed in opinion with the result on the merits which had been reached by the arbitrator and would constitute an intrusion upon his exclusive function to pass upon the merits of the grievance." 242 F. Supp. at 611, 612.

IV.

The grievant and the Union accepted final payment and settlement under the award. See, Affidavit Lawrence Kennelly, Defendant's Statement of Material Fact in Support of Motion for Summary Judgment. The employer and the grievant implemented it. The employer acted pursuant to its compulsory force in paying off the grievant. This case is moot. The June 9, 1969 Order of this Court is not open to attack under Rule 60(b) and the arbitrator's award is not subject to attack under Section 301 of the LMRA.

CONCLUSION

It is respectfully submitted that the Plaintiff's Motion be denied and that the Defendant's Motion for Judgment on the Pleadings be granted.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Statement of the Case in Opposition to Appellants' Motion Under Rule 60(b) Federal Rules of Civil Procedure in Support of Motion for Judgment on the Pleadings

There was an arbitration under a collective bargaining agreement over a discharge in October, 1967, and the Union lost it. (Award dated April 12, 1968 attached to the Complaint as Exhibit A). The Plaintiff filed a Complaint in this Court on July 11, 1968 to vacate the award, discharge the arbitrator, and direct a second arbitration before a new arbitrator, on the following grounds:

- (a) The award exceeded the authority of the arbitrator.
- (b) The arbitrator acted under a mistake of law.
- (c) The arbitrator refused to hear certain material evidence.
- (d) The award is arbitrary, capricious and irrational.

On January 27, 1969, Plaintiff amended the grounds of the Complaint to state:

The award of the arbitrator is improper and unlawful in that:

- (a) In sustaining the discharge on grounds other than those on which the company based the discharge, the award exceeded the authority of the arbitrator.
- (b) The arbitrator refused to hear or consider certain material evidence.
- (c) The award is arbitrary and capricious, and

Following the award, plaintiff discovered new evidence, attached hereto as Exhibit B, which has a direct and substantial bearing on a central issue of the arbitration.

The Plaintiff further amended the relief requested as follows:

(1) That, the award be affirmed insofar as it finds that Mrs. McLendon was not guilty of gross misconduct; that it be vacated insofar as it exceeds that issue and upholds her discharge on grounds of 'good and sufficient cause'; and that Mrs. McLendon be reinstated to her employment with back pay and all employment rights unimpaired;

(2) In the alternative, that the award be vacated in its entirety and that the discharge be arbitrated de nova before a new arbitrator, with instructions to receive and consider the newly discovered evidence, and to receive and consider the material evidence previously rejected.

(3) And for such other and further relief as may seem just and proper.

Cross Motions for Summary Judgment were fully briefed and extensively argued in the District Court. The Court on June 9, 1969, (about a year after the arbitration award and a year and a half after the discharge), ordered that Summary Judgment for Defendant dismissing the Complaint be granted and that Plaintiff's Cross Motion for Summary Motion asking that the award to vacate be denied.

. . .

The issue presented by the Union in the arbitration was:

"The alleged misconduct involves an unproved charge of plagiarism against Mrs. McLendon. The Guild maintains that the discharge was not for good and sufficient cause." Letter, Guild to AAA, dated October 27, 1967. Ex. C., attached to Answer.

The arbitrator stated the issue to be arbitrated as presented by the Published in its opening statement without counterstatement by the Union:

"The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement."

On April 12, 1968, the arbitrator made a clear and unambiguous award as follows:

"The discharge of Mrs. Winzola McLendon was not for wilful neglect of duty or gross misconduct but it was for good and sufficient cause."

* * *

Rules 28 and 31 of the American Arbitration Association read as follows:

"28. Evidence. —The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. . . . The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary . . ."

"31. Closing of Hearings. —The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. . . ."

See, Defendant's Statement of Material Fact in support of its Motion for Summary Judgment, item 12.

* * *

In its Statement in support of Motion for Summary Judgment, Defendant stated:

Following the issuance of the award the Plaintiff, the grievant and Company representatives met on or about May 6, 1968, to compute the separation pay due grievant as required by the collective bargaining agreement under the award. The proper computation of the time worked by grievant for purposes of arithmetically determining separation pay was disputed. The matter was resolved by mutual agreement plus an additional voluntary adjustment to be paid by the Company. Said settlement agreement was confirmed by letter dated May 7, 1968, from Company to the Union. Grievant has received the money by depositing the checks paid her under the settlement agreement.

See, Defendant's Statement of Material Fact in support of its Motion for Summary Judgment, item 7.

* * *

In its Statement of Material Fact in support of its Motion for Summary Judgment, the Defendant summarized the disputes background from the findings of the arbitrator's award (Exhibit A to the Complaint) as follows:

The arbitrator found:

On Monday or Tuesday, August 28 or 29, 1967, grievant was assigned to do a story on Prospect House, an historic house in Washington, for publication Sunday, September 10. She did a rough lead on Thursday, August 31, which was shown to Louise Oettinger, the editor, and grievant was relieved of other editorial work 10 a.m. Saturday, to work on the Prospect House story. She obtained from the owner of Prospect House, Mrs. Chatham, a manuscript signed

by Mrs. William L. Blue which Mrs. Blue had prepared for the Fine Arts Commission. When the owner of Prospect House turned the report over, she requested it be returned in a couple of hours and that no reference be made to the report in grievant's story. Mrs. McLendon's article was published September 10. On October 10, 1967, Mrs. William L. Blue wrote the Publisher that she wanted the newspaper to know "almost all of the historical material so liberally quoted by Mrs. McLendon was taken from an historical survey of Prospect House prepared for the Fine Arts Commission. Of course Mrs. McLendon failed to credit the latter organization in any way, nor did she ask permission to use any part of this study from a member of the Fine Arts Commission . . . or from me, the volunteer historical researcher who prepared the survey."

As the arbitrator found:

Mrs. McLendon utilized extensive passages of the Blue report without attribution in the articles itself, she failed to secure permission to use the report from the persons authorized to grant such permission; she failed to inform her editors of the circumstances under which she secured the report as well as the conditions the owner of Prospect House attached to its use; she failed to ascertain whether or not the Blue Report was in fact what she believed it to be, namely, a handout; and she should have been alerted by the owner of Prospect House's unwillingness to have the Blue report leave the owner at all and at its subsequent insistence that it be returned in an hour or two and her insistence that no reference be made in the story to her report. She was on notice by the fact that Mrs. Blue's name was appended to the report; that many footnote superscripts appear in the manuscript and that two pages of footnote references were part of the report. She did not ask any questions

whatever on the foregoing matters of Mrs. Chatham or when the manuscript was prepared or whether it would be published.

See, Defendant's Statement of Material Fact in support of Motion for Summary Judgment, item 10.

* * *

Plaintiff's Statement of the case involves a restructuring of the arbitrator's award to reframe the issue, as an afterthought, to be more hospitable to its present needs. It seeks to reframe the case as being one between Mrs. Chatham and Mrs. McLendon, and not one between Mrs. McLendon and the publisher under the terms of a collective bargaining agreement. The issue before the arbitrator as framed by the contract and by the parties was one arising between a publisher and an employee over whether a discharge was for cause because the employee committed the act of plagiarism as between the publisher and the employee under journalistic standards, not as to something else between Mrs. Chatham and Mrs. McLendon.

* * *

It is true that the Defendant has sought and secured a certain time extension for filing its appeal brief in the Circuit Court of Appeals for the District of Columbia and asked for a further extension. The Defendant does not believe that the Circuit Court of Appeals granted the Motion to extend time to October 13, 1969 because the Appeals Court believes that Rule 60(b) applies to this kind of case and the Plaintiff did not ask the Circuit Court of Appeals to so decide. The Union has asked for an extension of time to either come here under 60(b) or file its brief by October 13, 1969 and the Court did not rule on the matter until October 10, 1969. It was only proper to grant the time extension. Since the Plaintiff has attached copies of its motions for enlargement of time for filing brief in the Circuit Court, there is attached hereto

as Exhibit Nos. 1A through 1J all papers to date in connection with said motions and Defendant's oppositions thereto.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**Plaintiff's Response to Defendant's Opposition To Plaintiff's
Motion Under Rule 60(b) To Vacate Judgment Enforcing
Arbitration Award**

Putting it bluntly—but we think justifiably so—defendant's opposition lays down a fog of confusion and irrelevance which must first be dispelled in order to clear the air for discussion of the sole issues raised by plaintiff's motion, namely, whether under Rule 60(b), Federal Rules of Civil Procedure, this Court has the power to vacate its order enforcing the arbitration award and direct a new arbitration; and, if so, whether that power should be exercised in the present circumstances.

I. Defendant's Irrelevant Arguments

A. In its Points and Authorities (page 4), defendant says: "The issue presented by the plaintiff's motion may be empirically stated—what has the arbitrator done wrong in reaching his decision that warrants the Court to set it aside and to order a new arbitration".

This is obviously *not* the issue raised by plaintiff's motion. Plaintiff's motion does not in any sense charge the arbitrator with error. On the contrary, plaintiff's motion assumes that the arbitrator committed no error at all; it asks that the order be vacated, not because of error, but because subsequent to the arbitration award and subsequent to this Court's order of June 9th enforcing same, an event occurred (fully described in the motion papers) which has made it unjust to leave that order standing. This is the very situation Rule 60(b) was designed to remedy. As Barron and Holtzoff states it: "This broad language [of Rule 60(b)(6)] gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice . . . [The Rule is a] *method of correcting a judgment which becomes unjust by subsequent developments*". (Emphasis added) Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, Section 1329 (at page 417) and Section 1331 (at page 430).

Thus, in spending page after page arguing that the arbitrator committed no error, defendant is wasting everyone's time by setting up a straw man and knocking him down.

B. The same is true for defendant's argument about the limits of the scope of judicial review of an arbitration award. It is obvious beyond the need of argument that plaintiff is *not* asking this Court to review the award. Plaintiff did ask for review of the award in its earlier motion for summary judgment which was denied by this Court in its June 9th Order. But review is *not* what is involved in this present motion under Rule 60(b)(6). To repeat, we are not here asserting error, either by the arbitrator in his award or by this Court in its summary judgment enforcing same. And we are not here asking this Court to review the award on the basis of any errors committed by the arbitrator. Thus, the principles defining the scope of review of an arbitration award—argued at

great length by defendant—have no bearing whatever on the present motion.

In its present motion, plaintiff is simply invoking Rule 60(b)(6) for its historical purpose of vacating a judgment which (however correct when issued) through no one's fault, has become unjust as a result of developments subsequent to that judgment. Specifically, plaintiff is asking the Court to cure that injustice by invoking the traditional remedy under Rule 60(b)(6), namely, vacating the judgment and ordering a new hearing.

II. *Is Rule 60(b) Applicable to the Present Case?*

A. Defendant acknowledges—as indeed it must—that “The part of Plaintiff’s motion that asks this Court to reopen its Order of June 9, 1969, may be brought by the Plaintiff under Rule 60(b) . . .” Of course, this is true. The Federal Rules of Civil Procedure “govern the procedure in the United States district courts in all suits of a civil nature . . .” [Rule 1, F.R.Civ.P.] And Rule 60(b) itself contains no exceptions or exclusions; it applies, by its very terms, to any “final judgment, order or proceeding”. As stated in Barron and Holtzoff, “All final judgments including consent or default judgments or judgments entered after contest are covered by this rule.” 3 *Federal Practice and Procedure*, Sec. 1322, at page 394.

B. Defendant also acknowledges—as indeed it must—that “. . . the district courts are empowered under Section 301 of the Labor-Management Relations Act, 29 U.S.C.A. Sec. 185 to decree specific performance of an agreement to arbitrate a grievance dispute”. [See Defendant’s Points and Authorities, footnote on page 9.]¹

¹ In the leading case of *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 942, the Supreme Court held that, pursuant to Sec. 301 of the Labor-Management Relations Act, the federal district courts are empowered to issue mandatory injunctions requiring parties to submit to arbitration any dispute subject to arbitration under the terms of a collective bargaining agreement. In the instant case, it is undisputed that the discharge in issue was required to be arbitrated under the terms of the collective bargaining agreement.

C. It is also true that, where an award of an arbitrator on an issue submitted by a union and an employer in accordance with a collective bargaining agreement has been set aside due to no fault of the union or the employer, there has been no arbitration of the issue, as required by the contract, and resubmission of the issue to arbitration is required. *Public Utility Const. and Gas Appliance Workers of State of N. J., Local No. 274 v. Public Service Elec. & Gas Co.*, 114 A2d 443, 35 N.J. Super. 414. This, of course, is a rather self-evident proposition, for otherwise the disputed issue would remain unarbitrated and thus unresolved, in contravention of the contract requirements and of the Congressional policy embodied in Section 301 of LMRA.

D. In light of the above principles and procedures, it is plain that, if this Court should, pursuant to Rule 60(b), vacate its Order of June 9th enforcing the arbitration award, the situation would be the same as though there had been no arbitration of the issue, and the Court would then have the right—under Section 301 of LMRA—indeed, the duty—to order the disputed discharge to be resubmitted to arbitration in accordance with the terms of the contract. Such an order would be mandatory under Section 301 of LMRA and also be in complete harmony with Rule 60(b) which provides that the court may relieve a party from a final judgment, order or proceeding “upon such terms as are just”. In the instant case, the only just terms would be to order a new arbitration. Certainly, the court could not simply vacate its order and then leave the disputed discharge issue in unresolved limbo.

III. Defendant's Arguments Against the Applicability of Rule 60(b)

A. Defendant argues that “this Court should simply put Rule 60(b) aside” because “National labor policy favors speedy and final resolution” of arbitration disputes. [Defendant's Points and Authorities, at pages 9 and 10]

But no Federal Court can simply "put aside" a Federal Rule of Civil Procedure. Granted there is a Federal policy favoring expedition and finality in arbitration awards; but there is also a Federal policy expressed in Rule 60(b) favoring the remedy of serious inequities arising *after* a judgment or order proceeding has become final. And therefore, the Court should not put aside either of those policies, but should balance them on the basis of the circumstances of the particular case. Thus, in the instant case, the relevant balancing question is: Is it more important that the interest of finality be served by refusing to vacate the order enforcing the award; or is it more important that the interest of fairness and justness be served by directing a new hearing in order that the critically material evidence now available may be heard and considered?

Defendant argues for "finality" in the kind of absolutist terms which are wholly at odds with the equitable principles underlying Rule 60(b). Rigid generalizations are entirely out of place in determining the availability of Rule 60(b), for it is a rule which encompasses *every* method available under common law equitable principles—and more—for correcting inequities arising in a particular case *after* an order or proceeding has become *final*. *Moore's Federal Practice*, Volume 7, Sec. 60.13. In the words of the Committee on the Rules: "... [Rule 60(b)] will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice". *Moore's Federal Practice*, Rule 60 at page 4010.

To argue, as defendant does, that Rule 60(b) is not applicable to arbitration awards because of the doctrine of finality is, on its face, a meritless argument, for it is precisely and solely with final judgments that Rule 60(b) is concerned, and its sole purpose is to provide relief against finality when subsequent events have rendered that finality

unjust. Defendant's argument—if credited—would write Rule 60 off the books.²

In effect, defendant is arguing that Rule 60 was intended to correct inequities in all situations except arbitration. There is not a shred of language or legislative history to permit a reading of such exception into the Rule; and defendant points to none. To the contrary, Rule 60(b)(6) is, as Professor Moore notes, "the grand reservoir of equitable power to do justice in a particular case" *Moore's Federal Practice*, Volume 7, 60.27[2], at page 308.

B. Next, defendant makes the strange argument that Rule 60(b) does not apply to the remedial aspect of plaintiff's motion (i.e., remand for new hearing), because that aspect is governed by Section 301(a) of LMRA, the statute under which this action was brought. But this argument is equating apples to bananas and makes no sense at all. The fact that one bases his complaint upon a Federal statute (*any* Federal statute) does not mean that the Federal Rules of Civil Procedure do not apply. Nor does it make any sense to argue that the Federal Rules are applicable to substance but not to relief or remedy.

As we have noted earlier, defendant admits this Court has the power to vacate its order under Rule 60(b). And defendant further admits this Court has the power under Section 301 of LMRA to order parties to arbitrate an issue covered by an arbitration clause in a collective bargaining agreement. Thus, if the Court vacates its order enforcing the award, it has the duty—both under Section

²It should be noted that, even aside from Rule 60 and in spite of the policy favoring finality, arbitration awards are reviewable on many grounds: (a) the award is outside the scope of the arbitrator's authority; (b) the award is arbitrary and capricious; (c) the arbitrator refused to accept relevant and material evidence; (d) fraud or corruption; (e) ambiguity; (f) and in certain circumstances, errors of law. There are no absolutes in the world of law such as defendant is contending; certainly not where the result is the destruction of equitable principles.

301 LMRA and under Rule 60(b)—to direct a new arbitration.

C. Defendant then makes the argument, on the basis of *LaValle Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569 (3rd Cir. 1967) that: "It is an equally fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration." [Defendant's Points and Authorities, pages 7 and 8]

Assuming this quotation reflects the law in the most literal sense, it has nothing to do with the present case. As noted earlier, this Court can set aside the arbitration award and, pursuant to both Section 301 of LMRA and to Rule 60(b), [the Court "may relieve a party . . . upon such terms as are just"], can order a new arbitration hearing. The situation at that point is the same as though there had been no arbitration. [*Public Utility Const. and Gas Appliance Workers of State of N.J. v. Public Service Elec. and Gas Co.*, 114 A2d 443, 35 N.J. Super. 414] Thus, to order a new arbitration obviously does not collide with the doctrine of *functus officio*. If the doctrine of *functus officio*, as defendant argues, ruled out any possibility of re-arbitration, what does defendant think happens when an arbitration is set aside on one of the various grounds mentioned in footnote 2?³

³ Even assuming *arguendo* that *functus officio* did present some problem, it is certainly not the kind of absolutist doctrine for which defendant contends. In the case on which defendant relies for this proposition [*La Valle Plaza etc.*, 378 F.2d 569 (3rd Cir. 1967)], the last sentence of the quotation from that case [Defendant's Points and Authorities, p. 8] demonstrates that some erosion of that doctrine must be deemed to have occurred. The case says that the policy of finality on which *functus officio* is based "came [from] the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake". Certainly the doctrine of finality must be deemed to have undergone some relaxation under the terms of Rule 60(b) or else Rule 60(b) would be a nullity. The old doctrine of finality said "a [final] judgment . . . was unalterable even for the correction of a manifest mistake". Rule 60(b) says a final judgment is alterable for the correction of a manifest mistake.

D. Next, defendant tries to make the *Bridgeport Rolling Mills Company* case (314 F.2d 885, 2d Cir. 1963), stand for the proposition that Rule 60(b) is not applicable to arbitration awards. [Defendant's Points and Authorities, page 7]

But the fact is that the case stands for just the opposite proposition. In that case, the employer who lost an arbitration case filed a motion under Rule 60(b) to have the award vacated and a new arbitration ordered, on the ground of newly discovered evidence and fraud. The trial court did *not* find Rule 60(b) inapplicable. As the Court of Appeals notes in the decision : "The trial court held that the employer's affidavits failed to satisfy the employer's burden of proof". The plain and only implication of this holding is that Rule 60(b) *would* have been applied if the newly discovered evidence or the evidence of fraud had been stronger. If the trial court (or the appellate court) had considered Rule 60(b) to be inapplicable, it never would have reached the issue of the adequacy of the affidavits filed in support of the employer's motion; it would simply have dismissed on the ground that Rule 60(b) did not apply.⁴

E. Then the defendant contends that the only situation in which Rule 60(b) is available is where the moving party seeks a new trial in the Court in which the original trial was conducted.

Aside from the fact that this argument is basically inconsistent with defendant's own admission that Rule 60(b) is available to vacate the order enforcing the arbitration award, the language of Rule 60(b) itself rebuts any such restrictive reading of the Rule. It states that "On motion and upon such terms as are just, the court may relieve

⁴ Moreover, in *Bridgeport Rolling Mills*, the situation is the very opposite of the present case. There, as the court notes, the moving party has a remedy, namely, he can now discharge the employee on the newly discovered evidence and/or fraud. In the instant case, the moving party (i.e., the discharged employee) has no such remedy. Her only remedy is a new arbitration.

a party . . . from a final judgment, order or proceeding . . .” Thus, for example, in *McDowell v. Celebrezze*, 310 F.2d 43, the trial court, acting pursuant to Rule 60(b), vacated its final judgment which had affirmed the ruling of an administrative body. And the same was true in *Block et al. v. Thousandfriend, et al.*, 170 F.2d 428; and *In the Matter of Richard V. Helman*, 109 U.S. App. D.C. 375, 288 F.2d 159.

As the Committee on Rules has pointed out: Rule 60(b) “will deal with the practice in every sort of case in which relief from final judgment is asked, and prescribed the practice”. *Moore’s, Federal Practice*, Vol. 7, page 4010. And as the Rule itself states, it was designed, inter alia, to provide all the relief formerly provided by a whole series of common law writs, including the writ of audita querela. The latter “is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath a good defense, is too late to make it in the ordinary forms of law”. *Moore’s, Federal Practice*, Vol. 7, Sec. 60.13.

Since this Court, as stated in *Lincoln Mills* [353 U.S. 448], has the duty to fashion a body of national labor law under Section 301 of LMRA; and since Rule 60(b) which governs all Federal litigation expresses a national policy of remedying injustices arising after judgments or proceedings have become final (and therefore otherwise unremediable) it follows that Rule 60(b) should not be read to exclude the process of arbitration from the correction of inequities arising after final ruling.

F. Then defendant contends that the only judicial remedies available to the parties in the arbitration process are those which have been agreed upon in the collective bargaining agreement. Since the agreement says that the arbitration is to be “final and binding”, defendant contends no judicial remedy is available. [Defendant’s Points and Authorities, pages 5 and 10]

This argument is wholly without merit. As noted earlier, there are many grounds on which a party may seek judicial relief from an arbitration award, notwithstanding the absence of a single contractual word on which to base a request for such relief. Moreover, as also noted earlier, the arbitration process, with or without the contractual consent of the parties, has been made subject to Section 301 of LMRA under which the Court may order the parties to arbitrate, may rule on the arbitrability of the issue in dispute, and may enforce or set aside an award.

G. Next, defendant complains that a new arbitration could involve an unreasonably high amount of back pay because of the long time lapse since the discharge.

This is not an argument germane to the present issue. It is an argument to be directed to the discretion of the new arbitrator in the event he should direct Mrs. McLendon to be reinstated to her job. And in that event, under familiar rules, an arbitrator will deduct from back pay all interim earnings and all other earnings that the party could have had with the exercise of due diligence in seeking new employment. In addition, an arbitrator has the discretion to deny back pay altogether; or to reduce it on various equitable grounds. But to argue that there should be no rehearing at all because of the possibility of too high an award of back pay in the event of a reversal amounts to throwing the baby out with the bath.

H. Finally, defendant argues that there would never be an end to arbitration, if Rule 60(b) were available to order new hearings. The best and most decisive answer to this kind of argument was given by Justice Oliver Wendell Holmes. Confronted with the argument of a litigant that "the power to tax is the power to destroy", Holmes answered: "Not so long as this Court sits". The fact that Rule 60(b) is available does not mean that the Court is obliged to grant every motion made pursuant to it. The burden is on the moving party to demonstrate his clear entitlement to relief, and that burden is a substantial

one. Once again, defendant is asking that the barn be burned down in order to roast the pig.

IV. *The Critical Character of the Newly Available Evidence*

This issue has been thoroughly covered in plaintiff's motion papers, and only a few additional comments need be made in response to certain statements of defendant.

A. Defendant says that: "In its statement in support of its motion, Plaintiff, in effect, seeks to change the issue in the arbitration to make it more hospitable to Mrs. Chatham's affidavit." [Defendant's Points and Authorities, footnote on page 5] The best answer to this lies in an examination of the Award itself. It is plain beyond argument that a central issue in the arbitration of the discharge was whether Mrs. McLendon's use of the Blue report was (as the defendant contended) fraudulent and deliberately deceitful because she *knew* it had been prepared by Mrs. Blue for the Fine Arts Commission but did not obtain the Commission's or Mrs. Blue's permission to use it; or, whether (as plaintiff contended) she honestly and reasonably believed that it belonged to Mrs. Chatham, the owner of Prospect House, in which case her use of it, with Mrs. Chatham's authorization, could not be considered fraudulent or deliberately deceitful.

And it is also plain beyond argument that, in *three out of his four* basic conclusions upholding the discharge, the arbitrator sustained the defendant's view that, in using the Blue material, Mrs. McLendon had acted fraudulently and with deliberate deceit because she knew the report had been prepared for the Commission by Mrs. Blue but nevertheless made no effort to secure their permission to use it. [Award, at page 25]

The testimony of Mrs. Chatham is thus self-evidently critical, and no foundation exists for defendant's effort to downgrade its significance.

B. Finally: defendant makes the outlandish statement that "the arbitrator has already concluded *from Mrs. McLendon's own testimony* that Mrs. Chatham did not give her permission to use the written report without attribution". [Emphasis in original defendant's Points and Authorities, page 13]

The very opposite is the case. The arbitrator did not reach this critical conclusion on the basis of Mrs. McLendon's testimony. He reached this conclusion by *discrediting* her testimony. And this is the very reason that Mrs. Chatham's testimony is critical. Mrs. Chatham is the *only* person who can give independent testimony that she did, indeed, give Mrs. McLendon full permission to use the material and did so in a manner that made Mrs. McLendon's reliance thereon perfectly reasonable and sincere.

SEYMOUR J. SPELMAN
Seymour J. Spelman
Counsel for Plaintiff

SPELMAN, LECHNER AND WAGNER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Memorandum and Order

On April 18, 1968, Arbitrator Emanuel Stein issued an award sustaining the discharge of Mrs. Winzola McLendon by the Defendant, The Washington Post Company.

On July 11, 1969, Plaintiff Union filed the complaint in this case, asking this Court to vacate the arbitration award on the grounds that the award was arbitrary and capricious because it lacked adequate factual support. Both parties filed motions for summary judgment, and on June 9, 1969, this Court entered an order granting defendant's

motion and denying plaintiff's motion. The effect of that order was to sustain the arbitration award.

On November 29, 1969, plaintiff moved, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the order granting summary judgment and to remand the case for a new arbitration hearing. Plaintiff's principal contention is that the testimony of a witness, Mrs. Patricia Firestone Chatham, who refused to testify at the arbitration hearing and whose testimony could not be compelled because of the absence of subpoena power at arbitration hearings in the District of Columbia, is now willing to testify. Her testimony, plaintiff asserts, was and is crucial to the presentation of Mrs. McLendon's case and its consideration by the arbitrator would be likely to compel a different result.

For the reasons which subsequently appear, it is the opinion of the Court that plaintiff's motion should be denied.

The Supreme Court has emphasized that courts should be reluctant to review the merits of arbitration awards. In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), Justice Brennan stated that: "The refusal of Courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." 363 U.S. at 596. Arbitration awards will generally be enforced unless they are arbitrary, or not adequately grounded in the basic collective bargaining agreement; or unless there is some gross irregularity such as fraud in the arbitration proceeding. *Safeway Stores v. American Bakery & Con. W.I.U. Local 111*, 390 F.2d 79 (5th Cir. 1968). In *Holly Sugar Corp. v. Distillery Rectifying, Wine and A.W.I.U.*, 412 F.2d 899 (9th Cir. 1969) the Court held that if an arbitration award on its face repre-

sented an interpretation of the contract which, considering the conduct of the parties, was plausible, judicial inquiry should cease and the award should be affirmed.

The award which the arbitrator rendered in this case appears reasonable on its face and adequately supported by evidence developed during the course of the hearing. While it is arguable that the award does not represent the only set of conclusions which the evidence might have supported, the award does not appear to be capricious, arbitrary or manifestly unfair to Mrs. McLendon. In *Safeway Stores v. American Bakery & Con. W.I.U.*, *supra*, the Court stated:

"Arbiters, as do Judges, can err. And the policy of the law . . . committing awesome questions of great intricacy and difficulty to lay persons who need not be, and frequently are not, even lawyers, has to reckon with the likelihood that the chance—and gravity—of error will be greater, not less, than with traditional judicial processes. We may assume, without here deciding, that if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the Court can strike down the award. But where it is not that gross the arbiter's error—even though on an issue on which the reviewing court would have arrived at a different decision does not ipso facto make the arbiter an outlaw or his erroneous action a matter outside the scope of the agreement to arbitrate, in excess of the terms of the submission or beyond his powers as an arbiter."

390 F.2d at 82, 83.

There is no indication that the arbitrator here exceeded his powers or that the dispute might have involved issues which the parties had not agreed to submit to arbitration. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Plaintiff argues that the award should be set aside so that the arbitrator could have the opportunity to consider the testimony of Mrs. Chatham. That testimony, the Union contends, is likely to compel a different result in the arbitration proceeding and without the testimony there is an inadequate factual predicate for the arbitrator's decision.

The present availability of testimony whose existence was known but could not be produced at the arbitration hearing does not justify reopening the hearing. Unless parties are bound by the records made before the arbitrators, the piecemeal or staggered submission of evidence would be likely to erode the effectiveness of arbitration as a speedy and efficient forum for resolving labor disputes. In *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885 (2d Cir. 1963) the Court held that "... the parties having agreed to an arbitration of their differences are bound by the arbitration award made upon the testimony before the arbitrator." 314 F.2d at 886.

Both parties ought to have known before Mrs. McLendon's case was submitted to arbitration that this subpoena power is unavailable in private arbitration proceedings in the District of Columbia. Thus, one of the contingencies which the parties had to reckon with prior to arbitration was that a complete factual presentation might be impossible and that an award might be based on a record that did not include all of the pertinent or relevant information.

Therefore, it is this 23rd day of January, 1970,

ORDERED, that plaintiff's motion be and hereby is denied.

AUBREY ROBINSON
Judge

January 23, 1970
(Date)

Affidavit of Ira M. Lechner

County of Arlington
State of Virginia, —to-wit:

Ira M. Lechner, being duly sworn, deposes and says:

1. I am a counsel for the plaintiff in the above-entitled case and represented the Guild at a meeting with The Washington Post management on or about May 6, 1968, after the Arbitrator's award had been issued.

2. At that conference, the Guild disputed the amount of severance pay due the grievant Winzola McLendon. The conference was between myself as Guild Counsel, Mike Stewart, the Local's representative, and Lawrence W. Kennelly, Assistant General Manager of the Washington Post. At no time during the conference, or prior or subsequent to it, did either I or Mr. Stewart propose, discuss, or agree to a settlement of the grievance. No settlement agreement was entered into and the discussion involved only the proper computation of Mrs. McLendon's service record at The Washington Post. At no time did I suggest that the Guild accept the Arbitrator's Award or that it was satisfied with the Award. To the contrary, at the conference I informed Mr. Kennelly that the Guild was studying the Arbitrator's Award for the purposes of appeal to this Court and both Mr. Kennelly and I agreed that the conference was without prejudice to our respective legal positions.

3. On May 7, 1968, the Guild received a letter from Mr. Kennelly, dated May 6, 1968, with respect to dispute over the amount of Mrs. McLendon's severance pay and consistent with our conference on May 6, 1968, Mr. Kennelly concluded his letter by stating, "These actions are taken without prejudice." (Attached as Exhibit 3 to the Affidavit

of Lawrence W. Kennelly in support of Defendant's Motion).

IRA M. LECHNER
Ira M. Lechner

Subscribed and sworn to before me, a Notary Public, this
13th day of January, 1969.

W. DEAN WAGNER
Notary Public

My Commission Expires: March 20, 1972

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,398; 23,980

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
LOCAL 35, *Appellant*

v.

THE WASHINGTON POST COMPANY, *Appellee*

On Appeal from the Decision of the United States District
Court for the District of Columbia

John J. Spelman, Jr. Clerk
1970 JUN 18 1970
SPELMAN, LECHNER AND WAGNER

By SEYMOUR J. SPELMAN

1925 North Lynn Street
Arlington, Virginia 22209
Counsel for Appellant

Shirley J. Spelman
CLERK
April 15, 1970.



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* Cases chiefly relied upon are marked by asterisks.

STATEMENT OF QUESTIONS PRESENTED

1. When an employer discharges a veteran employee of unblemished record on the ground of gross misconduct—without indicating whether or not it would have invoked that ultimate penalty if the misconduct had not been gross—does an arbitrator, who is assigned the issue of determining whether or not the employee was guilty of gross misconduct (and therefore dischargeable on that ground) exceed the scope of his authority when he finds the employee not guilty of the charge of gross misconduct but, on the tacit and factually unsupported assumption that the employer would have invoked the discharge penalty even if the misconduct were not gross, goes on to uphold the discharge on the ground that the employee's misconduct, though not gross, was such as would in his opinion justify a discharge?

2. Where a newspaper writer is discharged for alleged plagiarism, does an arbitrator, to whom the discharge dispute is assigned for determination, act arbitrarily and capriciously, and therefore commit reversible error, when he refuses to allow in evidence or to consider in any way testimony and documents proffered to show that the alleged plagiarized material was not the literary composition of the party claiming it, but was in fact historical material in the public domain, the use of which does not constitute plagiarism?

3. Where certain critical testimony bearing on the central issue of a discharge from employment could not be produced at an arbitration hearing because no subpoena ad testificandum is available in the jurisdiction, was it error for the court to deny a motion under Rule 60(b), F.R. Civ. P. to vacate the arbitration award and remand for a new hearing when, following the award, this evidence became available and was incorporated in an affidavit showing the probability that the evidence would result in a reversal of the award?

This case has not been before the Court previously.



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,398; 23,980

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
LOCAL 35, *Appellant*

v.

THE WASHINGTON POST COMPANY, *Appellee*

On Appeal from the Decision of the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Washington-Baltimore Newspaper Guild, Local 35, plaintiff below, from two orders of the United States District Court for the District of Columbia in favor of the defendant below, The Washington Post Company. The jurisdiction of this court is based on 28 U.S.C. 1291.

REFERENCE TO RULINGS

Appeal #23,398.

The District Court did not file any opinion, memorandum, findings and conclusions or any other oral or written ruling in which the court set forth the basis of the order of June 9, 1969 presented for review by this Court.

Appeal #23,980.

Memorandum and Order, Filed by District Court on January 28, 1970 (Appendix, page 200).

STATEMENT OF THE CASE

Appellant, Washington-Baltimore Newspaper Guild, (hereafter the Guild) and appellee, Washington Post Company (hereafter the Post) are parties to a collective bargaining agreement which provides that "No employee shall be discharged except for good and sufficient cause"; and for arbitration of disputes over discharge which cannot be resolved by agreement. [App. 5]

On October 19, 1967, Mrs. Winzola McLendon, a thirteen year employee of the Post, was discharged. In a letter to Mrs. McLendon dated October 26th, the Post Managing Editor stated: "... you were discharged on October 19, 1967, for gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism." [App. 136, 146]

The Guild and Post were unable to resolve the dispute over Mrs. McLendon's discharge and the matter was referred to arbitration. On April 12, 1968, following a hearing, Arbitrator Emanuel Stein issued his Award. He found that Mrs. McLendon was not guilty of gross misconduct, the sole ground on which the Post based its decision to discharge Mrs. McLendon; but he nevertheless went on to sustain the discharge on the ground that her misconduct,

though not gross, constituted "good and sufficient cause" for discharge. [App. 4-42]

Appellant then filed an Amended Complaint in the District Court charging that the Award was improper and unlawful in that: (a) in sustaining the discharge on grounds other than those on which the company based the discharge, the award exceeded the authority of the arbitrator; and (b) the arbitrator was arbitrary and capricious in refusing to hear or consider certain material evidence. Appellant asked that the award be affirmed insofar as it found that Mrs. McLendon was not guilty of gross misconduct; that it be vacated insofar as it exceeded that issue by upholding her discharge on grounds of "good and sufficient cause"; and that Mrs. McLendon be reinstated to her employment with back pay. In the alternative, appellant asked that the award be vacated in its entirety and that the discharge be arbitrated de novo before a new arbitrator with instructions to receive and consider certain material evidence previously rejected. [App. 82-84]

Thereafter, appellant and appellee filed cross motions for summary judgment. On June 9, 1969, the District Court entered an Order, granting appellee's motion for summary judgment and denying appellant's motion. The effect of this Order was to enforce the arbitration award and thus uphold the discharge of Mrs. McLendon.¹ On July 7, 1969, appellant noted its appeal. [Appeal #23,398]. [App. 94, 155]

While this appeal was pending, appellant filed in the District Court a motion under Rule 60(b), F.R. Civ. P., asking the court to vacate its Order of June 9th granting summary judgment to appellee and to remand the case for a new arbitration hearing. The ground of the motion was that certain critical evidence not legally available to appellant at the time of the arbitration hearing had just become available and, when considered by the arbitrator, would in

¹ No opinion or findings of fact were issued in connection with this Order and thus the basis for the Court's ruling is not known.

all probability reverse the outcome of the arbitration of the McLendon discharge. [App. 155, 157, 163]

On January 28, 1970, the Court filed its "Memorandum and Order" denying appellant's motion. Thereafter, appellant filed a timely notice of appeal. [Appeal #23,980]. On March 26, 1970, this Court granted appellant's motion to consolidate the two appeals. [App. 200]

An understanding of the three issues raised in this consolidated appeal requires first a statement of the events leading to the discharge.²

A. The Events Leading to the Discharge.

Mrs. McLendon was scheduled to leave on vacation on Monday, September 4, 1967, and Saturday, September 2nd, was her last work day before the vacation. On week days, she did general reporting in the Women's Section; on Saturdays, she served as editor of the Women's Section. Her regular day off (in addition to Sunday) was Thursday. [App. 137]

On Monday or Tuesday of that week (August 28 or 29), the Women's Editor, Miss Marie Sauer, asked her to do a story on Prospect House, an historic Georgetown house, for publication on September 10th. This was to be a "big story", in color, on the front page of the Women's Section. Mrs. McLendon explained that she "didn't really have the time" to do such a story on Prospect House because of the press of other work she had to complete before leaving on vacation. The response of Miss Sauer was: "I know this, and I realize it, but we don't have anybody else to send, and you will just have to do it, and do it the best you can within the time that you have." [App. 138]

² The facts are based on the findings of the arbitrator in his Award and on undisputed testimony from the arbitration hearing set forth in "Statement of Material Facts As To Which No Genuine Issue Exists Submitted in Support of Cross Motion for Summary Judgment by [Appellant]." Both documents are printed in the Appendix. The transcript of the arbitration hearing is part of the record on appeal. [App. pp. 4-42; 136-155]

The owner of Prospect House, Mrs. Patricia Chatham, was available for interview only on Thursday, Mrs. McLendon's normal day off. Miss Sauer told Mrs. McLendon to shift her day off to Wednesday, rejecting (for budgetary reasons) Mrs. McLendon's request to work both days (Wednesday and Thursday) so that she would have more time to do the Prospect story and also complete her numerous other assignments. [App. 138]

In his Award, the Arbitrator makes the following findings regarding this time pressure imposed by the Post on Mrs. McLendon: "According to that testimony, which was not disputed by the Publisher, Mrs. McLendon did not begin writing the Prospect House story on Saturday until about noon . . . She estimated that she had no more than three hours on Saturday 'at the very most' to do the story . . . Even assuming that she had an hour or two more, it seems to me crystal-clear that it was impossible for her to do the kind of job described by the authorities at the Post as their standard within the available time. Mr. Wiggins (Editor of the Post who participated in the discharge decision) spoke³ of a 'creative product' and 'original research.' He stated: 'I would expect [the reporter] to look up the relevant literature. . . .' It can scarcely be contended that within the space of three to five hours it would be possible 'to look up the relevant literature' covering the history of a 150-year old house, of its numerous occupants (all or most of whom were quite obscure), of any interesting peripheral material (e.g., famous guests), and write a 1500-word feature story. Not only could not Mr. Wiggin's research standards be conformed to in so short a time-span, but even the preliminary task of sorting out names and dates could scarcely be accomplished, let alone the writing . . . It is, of course, impossible to say what kind of story

³ Mr. Wiggins was a witness for the Post at the arbitration hearing to support its decision to discharge Mrs. McLendon for "gross misconduct." The above quotations in the Award are excerpts from his testimony.

Mrs. McLendon would have written if she had had more time." [Award, pp. 27-28; App. 138-139]

Within those time limitations found to be "impossible" by the arbitrator, Mrs. McLendon interviewed Mrs. Chatham at Prospect House on Thursday, August 31st. In response to Mrs. McLendon's questioning, Mrs. Chatham revealed that she had had prepared a complete inventory of the house furnishings, with prices, which she permitted Mrs. McLendon to peruse but only after insisting that the existence of the inventory not be disclosed as the source of Mrs. McLendon's information. [App. 139]

Mrs. McLendon, not having the time to do her own research, then asked Mrs. Chatham if she had a "hand-out or fact sheet" recounting the history of the house. Mrs. McLendon knew from her own experience as a reporter that many persons with "big homes, like Mrs. Merriweather Post . . ." have such historical fact sheets. Mrs. Chatham handed her a 14-page typewritten document concerning Prospect House which Mrs. McLendon regarded as "just an ordinary hand-out." Mrs. Chatham said: "I will let you see it, if you won't mention it . . ." and Mrs. McLendon responded: "All right, I won't." Mrs. Chatham further said: "Feel free to use it, but just don't refer to it." [App. 139-140]

As Mrs. McLendon read the document back at her desk at the Post, she saw for the first time, at the bottom of page 15, the following words "Prepared by Joan R. Blue (Mrs. William L.)." She had never heard of Mrs. Blue and "thought it was somebody Mrs. Chatham paid to do this for her," just as Mrs. Merriweather Post had employed a researcher to prepare a fact sheet on her home. In fact, in similar circumstances, Mrs. McLendon had once been told by a homeowner not to mention the name of the person who had prepared the historical brochure because "I paid her for this. This is mine." [App. 140]

At this time, Mrs. Chatham was trying to sell Prospect House and its furnishings for two million dollars, and, with

respect to her direction to Mrs. McLendon not to mention the document as the source of her information, Mrs. McLendon conjectured that, just as in the case of the inventory, Mrs. Chatham "didn't want people knowing she had gone to the expense to have her house written up." [App. 140]

As noted earlier, Mrs. McLendon wrote the piece on Prospect House in the three hours available to her on Saturday, September 2nd and then left on a month's vacation. She based the story on the interview with Mrs. Chatham; newspaper clippings in the Post's files, her own knowledge of the house and on the 14-page historical fact sheet (hereafter called the Blue report) provided by Mrs. Chatham. [App. 141]

A portion of the story—described by the Arbitrator as "substantial"—came from the Blue material. Some was copied verbatim. Some were quotations of quotations used in the Blue report. Some was a paraphrase of the Blue report. In accordance with Mrs. Chatham's direction, Mrs. McLendon did not mention the Blue report in the story nor did she ascribe any of the verbatim or paraphrased or quoted material to Mrs. Blue. [App. 141]

The story was published on September 10th. On October 10th, Mrs. Blue wrote to the Post protesting Mrs. McLendon's use of the Blue report without crediting the Fine Arts Commission, for which Mrs. Blue stated she had prepared the report, or without obtaining its permission. At the time she wrote the story, Mrs. McLendon had not been informed that the report had been prepared for the Fine Arts Commission and nothing on the document itself indicated that it had been prepared for anyone other than Mrs. Chatham, the owner of the house. [App. 142]

In her letter to the Post, Mrs. Blue also stated: "I realize that Mrs. McLendon obtained a copy of our survey from the present owner of Prospect House, (Mrs. Chatham) who probably encouraged Mrs. McLendon to use its con-

tents as if they were her own." Mrs. Blue further testified she believed Mrs. Chatham had "encouraged [Mrs. McLendon] to use the contents as if she, Mrs. Chatham, owned the report" and had done so "to promote the sale of her house." [App. 142-143]

Mrs. McLendon then met with Mrs. Blue, in the presence of Mrs. Helen Dudman, Executive Editor of the Women's Department of the Post. Mrs. McLendon told Mrs. Blue: "Mrs. Chatham gave this to me as a hand-out, and that is what I thought it was." Mrs. Blue replied: "I don't doubt that. She's done this to us before. All that woman wants to do is sell her house." Mrs. McLendon then said: "Mrs. Blue, I think your fight is with Mrs. Chatham", and Mrs. Blue responded: "I know that, but the fact remains you used this." [App. 143]

Mrs. McLendon, through Guild counsel, made strenuous efforts to secure the testimony of Mrs. Chatham at the arbitration hearing, but, on advice of counsel, she refused to appear, and, under D. C. law, there is no power to compel her appearance. [App. 143-144]

During Mrs. Blue's testimony, Guild counsel sought to introduce evidence to prove that virtually all of the Blue report itself had been copied verbatim or had been paraphrased from historical materials in the public domain, but, on objection from Post counsel, the Arbitrator refused to admit this evidence on the ground (in his words): "It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica." The prejudicial error underlying this ruling is treated at a later point. [App. 144]

Mr. Bradlee, the Managing Editor, after comparing the Blue report with Mrs. McLendon's story, consulted with Mr. Wiggins, the Editor, and then, as he stated in his letter of October 26th, discharged Mrs. McLendon for "gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism." [App. 144]

In making this decision, the Post acknowledged that it did not take into account that, as the Arbitrator found, "it was impossible for her to do the kind of job described by the authorities at the Post as their standard within the available time"; nor did it consider it relevant that Mrs. Chatham, the owner of Prospect House and the apparent owner of the document describing the house, had authorized her to use the material freely but not to attribute it to the document which she had furnished to Mrs. McLendon. Mrs. McLendon was discharged for "gross misconduct" because, in the company's view, she had committed "a major and serious act of plagiarism", by using substantial portions of the Blue report without attribution or credit to Mrs. Blue or the Fine Arts Commission. [App. 144]

In the company's words in its brief to the Arbitrator: "The Company contends that such use was gross misconduct, constituting plagiarism; [App. 61] . . . Mrs. McLendon made fraudulent use of a substantial and material part of Mrs. Blue's report . . . It is undisputed that she did not have permission of the author . . . Mrs. McLendon, in compliance with the condition laid down by Mrs. Chatham, made no mention of the Blue report in her article, and gave no credit to her source." [App. 61, 63, 64]

Against that background, we turn now to the specific facts on which the three prejudicial errors alleged in this appeal are based.

B. The Facts Relating to the Scope of the Arbitrator's Authority.

The contract between the Guild and the Post provides in Article VI(3) that "No employee shall be discharged except for good and sufficient cause." In the instant case, the good and sufficient cause assigned by the company in discharging Mrs. McLendon was "gross misconduct" for committing "the act of plagiarism." [App. 93a]

At no point prior to or during the arbitration did the Post ever state that it would have discharged Mrs. McLendon even if it had not considered her misconduct had been "gross", as charged. On the contrary, as specified hereafter, it very plainly indicated that it was the grossness of the misconduct which triggered its discharge decision. Thus, there was no evidence before the arbitrator as to whether or not the Post would have invoked the ultimate penalty of discharge against Mrs. McLendon—a 13-year employee of unblemished record—if her misconduct had not been deemed gross. Moreover, at no point did the company contend that, even if her misconduct were found not to be "gross", it would nevertheless have discharged Mrs. McLendon.

The company's first statement of the grounds of discharge was made orally by Mr. Benjamin Bradlee, Managing Editor, directly to Mrs. McLendon at the time of discharge (October 19th). He informed her she was discharged for "gross misconduct." [App. 146]

Next, in a letter to Mrs. McLendon on October 26th, Mr. Bradlee repeated the grounds of discharge in these words: "... you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in the Washington Post on September 10, 1967, you committed the act of plagiarism." [App. 146]

In the letter to the American Arbitration Association submitting the discharge to arbitration, the Guild defined the issue as follows: "... the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a women's page reporter for 'gross misconduct' to arbitration." [App. 146]

In his opening statement at the arbitration hearing, Post counsel put the issue in these words: "Mrs. McLendon was discharged for gross misconduct in that in the preparation of an article published on September 10, 1967, she

committed the act of plagiarism. The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable labor agreement." [App. 146]

Throughout the hearing, the company continued to put the issue solely in terms of "gross misconduct."

Thus: "It is the Post's position that, in preparing the article on Prospect House, Mrs. McLendon committed a major and serious act of plagiarism in using Mrs. Blue's report without permission or attribution of any kind, and that this constituted, and warranted discharge for gross misconduct." [App. 147]

The then Editor of the Post (J. Russell Wiggins) stated: "I think it (Mrs. McLendon's use of the Blue document) is certainly an act of gross misconduct of a kind which I think irremediable except by discharge." And later: "... it certainly constituted a piece of gross misconduct." [App. 147]

In defining the issue for purposes of eliciting the expert opinion of company-witness Dr. Earl F. English, Dean of the School of Journalism, University of Missouri, as to the justification for the discharge, Washington Post counsel expressed it as follows:

"Dr. English, in your opinion, as a teacher and as an active manager in the newspaper industry, would you regard the plagiarism that you observed in these two documents [i.e., the McLendon story and the Blue report] as grounds for discharge for gross misconduct?"⁴ [App. 147]

Throughout its post-hearing brief submitted to the Arbitrator, the Post continued to define the issue and justify the discharge solely on grounds of "gross misconduct."

⁴ Dr. English had been called as an expert witness by the Post. He had been asked a series of questions leading up to the ultimate opinion question set forth above. The arbitrator sustained objection to the question as not a proper subject for expert opinion.

Thus, on page 6 of the brief the company states that "she was discharged for gross misconduct." [App. 60] On page 7, "The company contends that such use (of the Blue document) was gross misconduct constituting plagiarism . . ." [App. 61] On page 8 (footnote) the company states: "Under the applicable contract . . . , the discharge was for gross misconduct and its justification depends upon the appropriate evaluation of all the pertinent facts involved in Mrs. McLendon's actual use of the Blue report in her article." [App. 61]

On Page 9, the company defines the offense as "gross misconduct for a fully experienced professional journalist, justifying discharge. . . ." [App. 63] On page 13, it states that "both Mr. Wiggins and Mr. Bradlee deem it gross misconduct." [App. 66]

At no time prior to the arbitration hearing or during the arbitration hearing or in its post-hearing brief to the arbitrator did the Post seek to define the issue or justify the discharge on the alternative ground that, even if Mrs. McLendon's misconduct were not deemed "gross", she was still guilty of a form of misconduct which (though lesser in degree) nevertheless also justified discharge for "good and sufficient cause." On the contrary, the Post made it clear in its brief that, in determining to discharge Mrs. McLendon, it did so because it considered the misconduct gross, not ordinary, the plain implication being that it would not have imposed such a severe and drastic penalty as discharge if the misconduct had not been gross. Thus, on page 17 of the brief, the Post states: "That this is not an ordinary form of misconduct for an employee is self-evident." And on pages 17-18: "It is the status of Mrs. McLendon as a fully experienced, seasoned reporter that makes her fraudulent use gross misconduct." [App. 69, 70]

Finally, on page 31, the company clearly rejected the notion that it was seeking to defend the discharge before the arbitrator on any ground less than gross misconduct. It stated: ". . . she has engaged in gross mis-

conduct. . . ." and "There is no evidence in this record which alters or mitigates the serious degree and character of Mrs. McLendon's conduct." If the company had been asking the Arbitrator to sustain the discharge even if he found evidence which mitigated the "serious degree" of the offense, it would obviously have argued that alternative ground at this point—or at least at *some* point—in the brief. [App. 81]

Not only did the company define the issue and defend the discharge solely in terms of "gross misconduct", but the Guild, in trying the case, treated the issue in the same fashion.

At one point, for example, at the end of the second day of the three-day hearing—after the Guild had put in its basic exhibits—Guild counsel then stated to the Arbitrator:

"This is what we maintain should be the basis for deciding whether or not Mrs. McLendon was justifiably discharged for gross misconduct." [App. 149]

In his Award, the Arbitrator found that Mrs. McLendon was not guilty of "gross misconduct". But he nevertheless went on to uphold the discharge as being for "good and sufficient cause." In effect, the Arbitrator's holding comes to this: Mrs. McLendon was not guilty of the offense (gross misconduct) for which she was discharged. But the company—in his opinion—could have discharged her on a lesser ground, had it chosen to do so. He then assumes, tacitly but without any evidentiary support, that the company would have chosen to do so, and, on that assumption, sustains the discharge.

C. The Facts Relating to the Refusal of the Arbitrator To Hear Material Evidence.

Appellant contends the matter should be remanded to the Arbitrator for his prejudicial refusal to admit certain material evidence. The relevant facts on this contention are the following.

The company fired Mrs. McLendon for gross misconduct on the asserted ground that she "committed a major and

serious act of plagiarism." The company stated at the outset of the arbitration hearing that "the legal definition of plagiarism is the appropriating of somebody else's property without permission and using it as his own, and *that is the definition of plagiarism we are dealing with. . .*" (Emphasis added). And in support of this position it then placed in evidence the definition of plagiarism from Black's Law Dictionary, Page 1308, 4th Edition, 1951: "PLAGIARISM: The act of appropriating the literary composition of another, or parts or passages of his writings, or the ideas or language of the same and passing them off as the product of one's own mind." [App. 150]

Plagiarism was the substance of the charge of "gross misconduct", and, as the company stated, the legal definition "we are dealing with."⁵ [App. 150]

Some of the material within the Blue report was placed within quotation marks. Where Mrs. McLendon used any of that material, she retained those quotation marks. Most of the material in the Blue report, however, did not appear within quotation marks, and where Mrs. McLendon used some of that material verbatim, she did not enclose it within quotation marks. [App. 150-151]

The Guild sought to introduce evidence at the arbitration hearing which would have shown that most, if not all, of this material in the Blue report which appeared without any quotation marks had nevertheless been copied verbatim by Mrs. Blue from historical sources in the public domain. The purpose of such evidence was to demonstrate that: (1) Mrs. McLendon, in using such material, was not guilty of the offense for which she had been fired, i.e., "appropriating the literary composition" of Mrs. Blue (since it

⁵ As the Arbitrator stated in his Award: "In urging that the dismissal of Mrs. McLendon for gross misconduct be sustained, the Publisher describes the issue as basically one of plagiarism—'the fraudulent copying of a material and substantial portion of the literary product of another.'" [App. 15]

was not in fact Mrs. Blue's composition);⁶ (2) The material was historical and in the public domain and thus its use did not constitute plagiarism; and (3) in any case, even assuming the worst, a "piracy of a piracy" is not plagiarism. [App. 151]

The Arbitrator refused to allow the evidence, on the ground that (in his words): "It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica." [App. 151]

D. The Facts Concerning the Denial of the Motion Under Rule 60(b) To Vacate Award and Remand for New Arbitration Hearing Because of Newly Available Material Evidence.

As stated by the arbitrator, the Post contended that Mrs. McLendon's use of the Blue report had been fraudulent and deliberately deceitful, because it believed "that Mrs. McLendon knew that the Blue report was prepared for the Fine Arts Commission and that, notwithstanding this, she made no effort to secure permission from Mrs Blue or from the Commission to use the report." [Arbitrator's Award, App. 15]

The Guild, on the other hand, contended that there was no fraud or deceit involved in the use of the Blue material. The Guild argued that Mrs. McLendon had been given the Blue report by Mrs. Patricia Firestone Chatham, owner of Prospect House, during a private interview; that Mrs. McLendon did *not* know that the report had been prepared by Mrs. Blue for the Fine Arts Commission; that Mrs. McLendon had been specifically authorized by Mrs.

⁶ This point (i.e., that the material in the Blue report was historical and not Mrs. Blue's literary composition) was particularly significant since the company felt that the gravamen of Mrs. McLendon's offense was the fact that she copied "from a single *non-historical and non-public* source (i.e., Mrs. Blue's). (Italicizing in original). In the mind of Bradlee who fired her, the critical fact was McLendon had used Mrs. Blue's "creative effort", Mrs. Blue's "own words." And the Arbitrator himself, in reaching his decision, assumed that these were "Mrs. Blue's own words."

Chatham to use the Blue report without attribution; and that the circumstances surrounding Mrs. Chatham's authorization were such that Mrs. McLendon reasonably believed that Mrs. Chatham (who was the owner of Prospect House) was the lawful owner of the report on Prospect House and therefore could properly authorize Mrs. McLendon to make full use of it. [App. 159]

Thus, a central issue in the arbitration of the discharge was whether Mrs. McLendon's use of the Blue report was (as the Post contended) fraudulent and deliberately deceitful because she knew it had been prepared by Mrs. Blue for the Fine Arts Commission but did not obtain the Commission's or Mrs. Blue's permission to use it; or whether (as the Guild contended) she honestly and reasonably believed that it belonged to Mrs. Chatham, the owner of Prospect House, in which case her use of it, with Mrs. Chatham's authorization, could not be considered fraudulent or deliberately deceitful. [App. 159]

In sustaining the discharge, the arbitrator concluded that Mrs. McLendon had "acted very improperly" in the following four respects: (1) "In the character and extent of the utilization of the Blue report"; (2) In her failure to make attribution [to Mrs. Blue or the Commission] in the article itself; (3) In her failure to secure permission to use the report from the persons [i.e., Mrs. Blue and the Commission] authorized to grant such permission; and (4) In her failure to inform her editors of the circumstances under which she secured the report as well as the conditions attached by Mrs. Chatham to its use." [Award, at page 25]. Thus, in three out of his four basic conclusions upholding the discharge [namely, (2), (3) and (4) above], the arbitrator sustained the company's view that, in using the Blue material, Mrs. McLendon had acted fraudulently and with deliberate deceit because she knew the report had been prepared for the Commission by Mrs. Blue but nevertheless made no effort to secure their permission to use it. [App. 37; 160]

Guild counsel had made strenuous efforts to induce Mrs. Patricia Firestone Chatham, the owner of Prospect House, to testify at the arbitration hearing, but, on advice of her counsel, she declined to do so. And inasmuch as there is no power of subpoena in a private arbitration in the District of Columbia, Guild counsel was unable to compel her testimony. [App. 160]

Guild counsel had interviewed Mrs. Chatham prior to the arbitration hearing and hoped she would consent to testify because her testimony in the view of said counsel would have supported plaintiff's contention (1) as to Mrs. Chatham's authorization of the use of the Blue report by Mrs. McLendon without attribution; (2) as to the circumstances surrounding that authorization which supported the reasonableness of Mrs. McLendon's belief that Mrs. Chatham owned and had the right to authorize the use of the report on her house; and (3) as to Mrs. McLendon's lack of knowledge of the Fine Arts Commission relationship to the report on Prospect House. [App. 161]

Without Mrs. Chatham's testimony, there was no one except the discharged employee (Mrs. McLendon) to testify on these vital points, for the conference between Mrs. Chatham and Mrs. McLendon, at which these events occurred, had been private. Thus, since Mrs. Chatham's appearance could not be compelled by subpoena, plaintiff was compelled to arbitrate the discharge without Mrs. Chatham's critical testimony and Mrs. McLendon, deprived of an absolutely essential witness, was thereby denied a full hearing on the merits.

Now, however, Mr. Chatham is ready, willing and able to come forward voluntarily and testify in accordance with her affidavit which is set forth at the end of this Statement of the Case. As she states in that affidavit, on advice of her counsel, she had refused the request of plaintiff's counsel to testify at the arbitration hearing, but that she is "now ready, willing and able to testify" in Mrs.

McLendon's behalf, regretting that she had rejected the original request of plaintiff's counsel. [pp. 19-21, *infra*]

Mrs. Chatham, a distinguished citizen of the District of Columbia, who has no personal interest in this matter except that, in her words, she wants "the full truth to be known", will (as her affidavit shows) testify in such a manner as to demonstrate the validity of the critical contentions of appellant outlined above which, being without *any* independent evidentiary support at the original hearing, were rejected by the arbitrator. Thus, as her affidavit shows, Mrs. Chatham will testify:

1. That Mrs. Chatham considered that she had "every right to permit Mrs. McLendon to use the material in the report for the preparation of her article for the Washington Post."

2. That Mrs. Chatham "did not tell Mrs. McLendon that the report had been prepared by Mrs. Blue or that it had been prepared for the Fine Arts Commission, and there was nothing on the copy (which she furnished to Mrs. McLendon) . . . which contained any mention of the Fine Arts Commission."

3. That Mrs. Chatham authorized Mrs. McLendon "to feel free to use it in any way she desired but not to refer to the report itself."

4. That Mrs. Chatham did not mean to mislead Mrs. McLendon and, if she did so, greatly regrets it.

5. That Mrs. Chatham "can very well understand, on the basis of what (Mrs. Chatham) said to (Mrs. McLendon) on that day, that (Mrs. McLendon) left (Mrs. Chatham's) home with the feeling that the report belonged to (Mrs. Chatham) and that she was free to use it, provided she did not refer to the report as such in her article." [pp. 19-21, *infra*]

And that is precisely what Mrs. McLendon proceeded to do—for which she was subsequently discharged by the Post on its belief that just the opposite had occurred than

what Mrs. Chatham is now ready to testify. Now, for the first time, Mrs. Chatham is willing to come forth and set the record straight.

The critical nature of this testimony of Mrs. Chatham, now available for the first time, is obvious, for it directly contradicts several of the principal conclusions on which the arbitrator based his award. Thus, as noted above, the arbitrator held that Mrs. McLendon "could [not] reasonably have regarded the report as a handout owned by Mrs. Chatham and which Mrs. Chatham could rightfully make available to reporters to be used as they saw fit. . . ." [App. 38]; and on that basis, he found therefore that Mrs. McLendon acted "very improperly . . . in her failure to secure permission to use the report from the persons authorized to grant such permission [i.e., Mrs. Blue and the Fine Arts Commission]." [App. 37].

Appellant, on the basis of that evidence, which had become available for the first time, asked the District Court, under Rule 60(b), to vacate its order of June 9, 1969, and to remand the case for a new arbitration hearing in order that the testimony of Mrs. Patricia Firestone Chatham can be taken and the evidence as a whole then be re-evaluated in light of that testimony.

• • • • •

AFFIDAVIT OF PATRICIA FIRESTONE CHATHAM

The undersigned Patricia Firestone Chatham, being first duly sworn on oath, deposes and states as follows:

My name is Patricia Firestone Chatham, and I am owner of and reside in Prospect House, at 3508 Prospect Street, N. W., in Georgetown. I am the person who was interviewed by Mrs. Winzola McLendon, then a Washington Post reporter, in the summer of 1967 concerning Prospect House and who furnished her at that interview with a 14-page typewritten report covering the history of the house.

After Mrs. McLendon was discharged from the Washington Post, I was asked by her attorneys to testify in her behalf at a hearing concerning her discharge, because the discharge had been based on Mrs. McLendon's use of that 14-page report on Prospect House. On advice of my former attorney, Sidney Sachs, I refused to testify. However, my refusal was not based on any feeling that Mrs. McLendon had acted improperly.

I have now learned that Mrs. McLendon's discharge was upheld. I am now ready, willing and able to testify in her behalf, and I regret that I refused to do so when originally requested by Mrs. McLendon's attorneys. I want the full truth to be known, and if I am given the opportunity to do so, I will testify to the following facts:

The typewritten report on Prospect House which I furnished to Mrs. McLendon had been prepared by a Mrs. Blue who had visited my house one day and asked if she could inspect it and write up a history of the house. Mrs. Blue mailed me a copy a short time before my interview with Mrs. McLendon. It contained material taken mainly from various books which I own dealing with famous Georgetown houses, and I considered that I had every right to permit Mrs. McLendon to use the material in the report for the preparation of her article for the Washington Post.

I did not tell Mrs. McLendon that the report had been prepared by Mrs. Blue or that it had been prepared for the Fine Arts Commission, and there was nothing on the copy which I furnished to her which contained any mention of the Fine Arts Commission.

I told her to feel free to use it in any way she desired but not to refer to the report itself. I had told her the very same thing concerning her use of the material contained in an inventory of the house furnishings which I had shown to her during the same interview. Mrs. McLendon did not question me as to why I did not wish her to refer to those documents, and I did not give her any reason, for I saw no point in doing so at the time.

I did tell her to return the report to me as soon as possible because it was my only copy, and I did not wish to part with it.

Since I am owner of Prospect House and since the report was given to me by Mrs. Blue under the circumstances I have described, I feel now and I felt then that I had every right to permit its use by Mrs. McLendon under the circumstances and in the manner I have described in this affidavit.

I certainly did not mean to mislead Mrs. McLendon and, if I did so, I greatly regret it. I can very well understand, on the basis of what I said to her on that day, that she left my home with the feeling that the report belonged to me and that she was free to use it, provided she did not refer to the report as such in her article.

/s/ PATRICIA FIRESTONE CHATHAM

Signed and sworn to before me this 2nd day of October, 1969, in Washington, D. C.

/s/ by Notary Public

STATEMENT OF POINTS

The trial court erred in:

1. Refusing to vacate that part of an arbitration award which exceeded the scope of authority of the arbitrator.
2. Refusing to remand the case for a new arbitration hearing where the arbitrator refused to admit in evidence certain significant evidence bearing directly on the central issue in the case.
3. Refusing to grant a motion under Rule 60(b), F. R. Civ. P., to vacate an arbitration award and remand the case for a new arbitration hearing where newly available evidence bearing directly on the central issue of the case was of such character as to raise probability that it would bring about a reversal of the decision.

SUMMARY OF ARGUMENT

I. The jurisdiction or authority of an arbitrator is defined by the terms of the issue submitted by the parties to the dispute. In the instant case, Mrs. Winzola McLendon, a 13-year reporter for the Washington Post with unblemished record, was discharged because the company considered her guilty of "gross misconduct" for what it termed her fraudulent and deliberate act of plagiarism in writing a story about an historic Georgetown home. It was what the company considered to be the grossness of this misconduct which triggered its decision to invoke the ultimate penalty of discharge for this first offense by a 13-year veteran employee. There is no indication in the record that the company would have invoked this ultimate penalty had it considered the misconduct to be less than gross; on the contrary, the record strongly implies the very opposite.

The sole claim made by the company to the arbitrator was that the employee was discharged for gross misconduct. At no point did the company contend, in the alternative, that, even if her conduct were found to be less than gross, it would still have fired her. And, the sole issue to which the union directed its defense was that, granting the misconduct, it was not gross misconduct, as charged by the company.

In this context, the arbitrator found that the employee was not guilty of gross misconduct. Having answered that question in the negative, his authority ended and the employee was thereby entitled as a matter of law to reinstatement. But the arbitrator ignored this limit on his authority and went on to find that, although the misconduct was not gross, it constituted in his opinion just and sufficient cause for discharge. Then, acting on the tacit (but factually unsupported) assumption that the company would have fired her even if the misconduct were not gross, he upheld the discharge as being "for good and sufficient

cause." In so doing, he clearly exceeded the bounds of his authority and was guilty of administering "his own brand of industrial justice"—an arbitral exercise outlawed by the U. S. Supreme Court.

II. The company fired Mrs. McLendon for gross misconduct on the asserted ground that she "committed a major and serious act of plagiarism." The company's position was that the controlling definition of plagiarism in this case was the following legal definition: The appropriating of somebody else's literary property without permission and using it as one's own. The Guild sought to introduce in evidence certain documents and testimony to show that the literary material in question did not belong to the person (Mrs. Blue) who claimed to have been plagiarized by Mrs. McLendon, but was in fact historical material in the public domain (whose use is not plagiarism) which Mrs. Blue herself had copied verbatim. The arbitrator refused to allow this material in evidence on the theory, in his words, that it would not matter if Mrs. Blue had copied the material verbatim from the *Encyclopaedia Britannica*. This is obvious error which, in the circumstances, was highly prejudicial. It is a self-evident proposition that the refusal of the arbitrator to admit material evidence deprives the party of a fair hearing and requires that the award be vacated and the matter be remanded for a new hearing.

III. One of the central issues was whether Mrs. McLendon's use of the Blue report was (as the company contended) fraudulent and deliberately deceitful (and therefore amounted to gross misconduct) because she knew it belonged to the Fine Arts Commission but did not obtain the Commission's permission to use it; or whether (as the Guild contended), Mrs. McLendon honestly and reasonably believed that this Blue report on Prospect House belonged to Mrs. Patricia F. Chatham, the owner of Prospect House, in which case her use of it, with Mrs. Chatham's authorization, could not be considered fraudulent or de-

liberately deceitful (and therefore did *not* amount to gross misconduct).

The only testimony the Guild was able to produce in support of its position on this critical issue was that of Mrs. McLendon, the discharged employee. The arbitrator rejected it as not credible. The only other person who could give direct testimony on the issue was Mrs. Patricia F. Chatham. The Guild interviewed Mrs. Chatham prior to the hearing and tried to persuade her to testify, for her testimony fully supported Mrs. McLendon on this central issue. But, on advice of her counsel, Mrs. Chatham refused to appear and testify; and her appearance could not be compelled because subpoenas are not available in private arbitration proceedings in the District of Columbia.

After the Award was issued, Mrs. Chatham, in the interest of truth and justice, came forward and volunteered to testify. Appellant filed a motion in the District Court under Rule 60(b) F. R. Civ. P., asking that the Order upholding the Award be vacated and the matter be remanded for a new arbitration hearing. In support of that motion, appellant filed the affidavit of Mrs. Chatham showing that she would testify that: (1) She had authorized Mrs. McLendon to use the report on Prospect House, without attribution; (2) She considered that she had the right to authorize Mrs. McLendon to use the report; (3) She did not advise Mrs. McLendon that the report had been prepared for the Fine Arts Commission and there was no mention of the Commission in the report furnished to Mrs. McLendon; (4) She did not mean to mislead Mrs. McLendon; and (5) She could understand, on the basis of what she said to her, that Mrs. McLendon honestly believed the report belonged to Mrs. Chatham and that she had full right to use it.

Inasmuch as all these factual points were central to the issue, and inasmuch as they directly contradict several of the principal conclusions on which the award is based,

appellant was clearly entitled to a favorable ruling on its Rule 60(b) motion. The Court's denial of this motion was plain error for it, in effect, deprived Mrs. McLendon of a fair hearing.

ARGUMENT

1. THE COURT ERRED IN ENFORCING THE ARBITRATION AWARD BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT

Appellant's basic contention is that a single question was submitted to the arbitrator for decision, namely, was Mrs. McLendon guilty of "gross misconduct", the sole ground asserted by the company for her discharge. When the arbitrator answered that question in the negative, as he did, his authority ended. But he went beyond that and decided a question which had not been submitted to him. He held that, although not guilty of "gross misconduct" as charged by the company, her conduct was such that the company could have discharged her under the general category of "good and sufficient cause" and, on that basis, upheld the discharge. Appellant asks this court—as it did the court below—to enforce the Award insofar as it holds that Mrs. McLendon was not guilty of the charge of "gross misconduct", since the holding on that question is plainly within the authority of the arbitrator. However, appellant asks that, to the extent that the arbitrator went beyond that issue, as described above, his award be vacated and Mrs. McLendon be reinstated to her position at the Post, with back pay and seniority rights unimpaired.⁷

In the alternative, appellant asks that the entire Award be vacated and the matter be remanded for an arbitration de novo because the arbitrator refused to hear and consider certain crucially material evidence, thereby deny-

⁷ Of course, the company would be entitled to offset against back pay the amount of money paid to Mrs. McLendon as severance pay under the Award and interim earnings from the date of discharge to date of reinstatement.

ing Mrs. McLendon a fair hearing. In a new arbitration, appellant also asks that the parties be required to select a new arbitrator for the present arbitrator cannot be expected to approach the matter in the required objective and impartial manner.

A. The Arbitrator Exceeded His Authority.

An arbitrator is not a court of general jurisdiction. The scope of his authority is no broader than the issue submitted to him by the parties for decision. In determining the scope of an arbitrator's authority, the Court examines the collective bargaining agreement between the parties and the particular question submitted and litigated in the case. If it finds the arbitrator has exceeded his authority, it will vacate the award.

These, of course, are Hornbook principles requiring no extensive citation of authority. A U. S. District Court expressed them clearly and succinctly in *Lee v. Olin Mathieson Chemical Corporation*, 271 F. Supp. 635 (1967).

"Whenever an arbitrator's authority to make a particular award is questioned, the court must look to the collective bargaining agreement and the submission to determine his authority since they are the source and limit of his authority."

"It is settled that if the arbitrator exceeds the scope of his authority, the award is unenforceable."⁸

Thus, the question in the instant case boils down to this: What was the issue or question which the parties asked the arbitrator to decide.

The contract contains the general provision that an employee can only be discharged if the employer has "good

⁸ In *Lee v. Olin Mathieson*, the court held that the award "is unenforceable to the extent that the arbitrator exceeded his authority." A single question had been submitted and "once he decided that [question], his jurisdiction ended." This is exactly the argument appellant makes here. The court in *Lee* enforced that part of the award found to be within the scope of the submission; and it set aside that part falling outside the scope.

and sufficient cause" for doing so. The phrase "good and sufficient cause", however, is obviously not a statement of the reason for a discharge in a particular case, but only a general criterion designed to evaluate the assigned reason for the discharge and to provide job security by forbidding arbitrary discharge. The phrase does not take on a specific meaning in an individual arbitration case until the employer gives it content by expressing his reason for discharging the particular employee. In the instant case, the employer said that it discharged Mrs. McLendon on the ground that she was guilty of gross misconduct for committing a fraudulent act of plagiarism. No other ground for discharge was given. Thus, in terms of the contract, the employer stated: Mrs. McLendon was guilty of "gross misconduct" for committing a deliberate act of plagiarism and this constituted the "good and sufficient cause" for her discharge.

As appellant has demonstrated in the statement of facts, from start to finish the only issue presented and argued by the company in the arbitration was whether Mrs. McLendon was guilty of "gross misconduct" for committing a "major act" of "fraudulent plagiarism." At *no* time did the company ever state, suggest or imply to the arbitrator that, even if the arbitrator were to find her guilty of misconduct less than "gross", he should nevertheless uphold the discharge under the generalized criterion of "good and sufficient cause." If the company really considered that such a second, alternative issue had also been submitted to the arbitrator, it is not conceivable that it *never* would have made any argument on that alternative ground—not at the hearing and not in its extensive post-hearing brief to the arbitrator.

And yet, it never did make any such argument. On the contrary, it stated that "under the applicable contract . . . , the discharge was for gross misconduct . . .". And on the last page of its brief to the arbitrator, it became

incontestably clear that it was not seeking to defend the discharge on any ground less than gross misconduct. It stated: "... she has engaged in gross misconduct . . . [and] there is no evidence in this record which alters or mitigates the serious degree and character of Mrs. McLendon's conduct." If the arbitrator had been submitted the second and alternative issue of whether Mrs. McLendon was properly discharged even if her misconduct were not considered "gross", then the company obviously would have made that alternative argument at that point in its brief, namely: But even if you, Mr. Arbitrator, *do* find facts which remove the element of "grossness" from her misconduct, we would still discharge her for the lesser offense and we ask you to uphold us on that basis.

Such argument was never made. Indeed, as the statement of facts shows, the company based the discharge and its case before the arbitrator on the sole issue of gross misconduct on the ground of fraud. If the alternative second issue had been submitted to the arbitrator, it surely would have showed up somewhere along the line of argument.

Thus, in going beyond the issue of "gross misconduct", the arbitrator was saying, in effect: I find that Mrs. McLendon was not guilty of gross misconduct, as the company charges. But I find that she did engage in misconduct which would in my judgment justify her discharge on a lesser ground encompassed within the phrase "good and sufficient cause." Therefore, on the (tacit but factually unsupported) assumption that the company would have discharged Mrs. McLendon even if her misconduct had not been gross, I uphold the discharge.

But at no point did the company state that it would have discharged Mrs. McLendon even if her misconduct had not been "gross." On the contrary, it very plainly indicated that it was the grossness of the misconduct which

triggered its discharge decision. Thus, there was no evidence before the arbitrator as to whether or not the company would have invoked the ultimate penalty of discharge against Mrs. McLendon—a 13-year employee of unblemished record—if her misconduct had not been deemed gross.

In the words of the Supreme Court, an arbitrator “does not sit to dispense his own brand of industrial justice”, and yet that is exactly what the arbitrator has done in this case. [*United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 at 597, 80 S. Ct. 1358 at 1361]. This kind of action plainly exceeds his authority for it goes beyond the scope of the submitted issue.

In exceeding his authority in this manner, the arbitrator has not only transgressed the jurisdictional rules of arbitration; he has very seriously prejudiced the grievant, Mrs. McLendon.

The company made it clear (in the words of its counsel) that “It is the total behavior of Mrs. McLendon in connection with the use of Mrs. Blue’s report in her article which represents the grounds for her discharge.” That “total behavior” includes not only the use of the Blue material by Mrs. McLendon but also the circumstances under which she received the report from Mrs. Chatham, the time pressure under which she was operating in writing the story and the reasonableness of her reliance on Mrs. Chatham’s authorization on use and her restriction on attribution.

The arbitrator found it “crystal clear” that it was “impossible” for Mrs. McLendon to have written the story on Prospect House under the Bradlee-Wiggins’ standard of “original research” within the allotted time and on that basis he absolved her of the charge of “gross misconduct.” But the company, in deciding to discharge her, admitted it did not even consider the relevance or impact

of this element of "impossibility" growing out of the time limitations. [Award, p. 27, 1st para.]. It might well be that, on reconsideration and taking this element into account, the company would now consider discharge too severe a penalty, particularly for an employee of 13 years unblemished service. The point is that the company's judgment—by admission—has *never* been exercised on the McLendon case with that significant element of time "impossibility" taken into account. It is only the *arbitrator* who has considered the impact of that element on the justification for discharge. And it is the arbitrator, not the company, who has said that, even considering this element of impossibility, the discharge is still justified. This is plainly a case of an arbitrator "dispens[ing] his own brand of industrial justice." Only the company can do this, and Mrs. McLendon is therefore entitled to have that judgment exercised only by the company. This is especially important in a case where it was the alleged *gross* character of the offense which triggered the extreme penalty of discharge and where the company indicated in its argument that it would not have imposed discharge if the misconduct had not been gross. The company's judgment on discharge on lesser grounds was never exercised. The arbitrator, in effect, usurped the company's role.

This same thing can be said with respect to the relevance of Mrs. Chatham's consent on the critical question of fraud. The decision to discharge Mrs. McLendon for what the company believed to be her "fraudulent" use of the Blue report was made by Mr. Bradlee, the Managing Editor, and Mr. Wiggins, the Editor. Mr. Bradlee, however, did not even tell Mr. Wiggins about the circumstances under which Mrs. McLendon got the material from Mrs. Chatham; Bradlee did not consider the issue of Mrs. Chatham's consent to be relevant. But it developed at the hearing that Mr. Wiggins *did* consider consent relevant and indeed declared that permission or consent "diminishes the offense."

Yet, the arbitrator, by going beyond the submission to decide for himself that the company would have fired Mrs. McLendon even if her misconduct was not gross, has actually deprived Mrs. McLendon of the opportunity for the *company*, not the arbitrator, to consider whether it still wants to impose the drastic punishment of discharge on her for *less* than gross misconduct, after taking into account the evidence that emerged at the hearing concerning the circumstances under which Mrs. McLendon came into possession of the Blue report. Perhaps a second look at those circumstances would in the company's mind, "diminish" the offense below the point at which *it* would decide to invoke the capital punishment of employment, i.e., discharge.

In effect, the arbitrator has deprived Mrs. McLendon of a fair and full hearing—indeed any hearing at all—by the company on the offense considered at a level below gross misconduct, by his assumption as to what the company would do at such hearing. The arbitrator assumes that, because the company, in his view, *could* have, on reconsideration, fired Mrs. McLendon for less than gross misconduct, *it would* necessarily have done so, and, on that assumption, he upholds the discharge.

This kind of arbitral action is plainly wrong and there are many cases where courts have set aside awards in circumstances analogous to the present.

Lee v. Olin Mathieson Chemical Corporation, (271 F. Supp. 635) which we have cited previously, is particularly relevant here because the court there upheld the arbitrator's award only to the extent that it stayed within the submission and set aside that part which exceeded the scope of the submission. This is the remedy plaintiff seeks here.

Polycast Corp. v. Local 8-102, Oil Workers, 59 LRRM 2572 (Connecticut Superior Court) is very much like the present case. The question submitted to the arbitrator

was: "Was employee James Epps disciplined for just cause under the terms of the labor agreement dated March 24, 1964. If not, what should the remedy be?"

The arbitrator found that Epps had not been disciplined for just cause and reinstated him to his job. But, the arbitrator felt Epps had been guilty of some misconduct and on that basis, denied him back pay. For this form of administering "his own brand of industrial justice," the Court set aside the award because "the arbitrator exceeded his power."

In *Stove Mounters Union v. Rheem Mfg. Co.*, 32 LA 266, a California court in setting aside an award, held that a submission agreement putting to arbitration the issue of whether the employer is required to pay 10 days vacation pay to an employee does not imply a power to award vacation pay for less than 10 days. The court ruled that the arbitrator had the power simply to answer yes or no to the submitted question of whether the employee was entitled to 10 days vacation pay.

In *Lynchburg Foundry Co. v. Steelworkers*, 68 LRRM 2379 (1968), the District Court for the Western District of Virginia vacated the arbitrator's award on the basis that, when the arbitrator found the discharge unjustified and reinstated the employee, he exceeded his authority when he then went on to impose the lesser penalty of loss of back pay. As the Court said: "Once the arbitrator determined this (i.e., that the discharge was not justified), his authority terminated." See also: *Textile Workers of America v. American Thread Co.*, 291 F.2d 894 (1961, 4th Cir.).

B. The Arbitrator Refused To Admit Crucially Material Evidence.

Mrs. McLendon was fired for alleged plagiarism in her use of what the company described as and believed to be Mrs. Blue's literary composition. The Guild sought to

introduce evidence which would have shown that most if not all of the material in the Blue report which appeared without quotation marks had been copied verbatim by Mrs. Blue from historical sources in the public domain. The arbitrator refused to allow the evidence because he said: "It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica."

It is a self-evident proposition that the refusal on the part of an arbitrator to admit material evidence on a central issue deprives the party of a fair hearing and requires that the award be vacated and the matter be remanded for a new hearing. *Harvey Aluminum, Inc. v. Steelworkers*, 64 LRRM 2580.

The evidence refused here clearly goes to the very heart of the matter. First, appellant wanted to show that Mrs. McLendon was not guilty of the very offense for which she had been discharged, namely, "appropriating the literary composition" of Mrs. Blue. This evidence would have shown that this material was not in fact Mrs. Blue's composition. Secondly, appellant wanted to show that the material was historical and in the public domain and that its use was not plagiarism, neither by Mrs. Blue nor by Mrs. McLendon. And finally, appellant wanted to demonstrate that, even assuming the worst, Mrs. McLendon was not guilty of plagiarism because "a piracy of a piracy" is not plagiarism. "When it is said that a mere new disposition of existing materials may be original, this must be taken with the limitation that the materials are such as may be lawfully used; there can be no protection for that which is itself a piracy." *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922 (1903).

Thus, the evidence was patently material and the arbitrator was patently wrong in refusing to hear or consider it, for it most certainly *could* make a difference "if Mrs. Blue had lifted the whole report from the Britannica."

In the event this court does not enforce the valid part of the Award and reinstate Mrs. McLendon—as requested by appellant in the previous section—then appellant asks the award to be vacated and the matter remanded for a new hearing, with instructions to admit and consider this evidence. An arbitrator could well rule differently on the basis of such evidence; indeed, the company itself might well re-evaluate the situation on that basis.

II. THE COURT ERRED IN REFUSING TO GRANT MOTION UNDER RULE 60(b) TO VACATE AWARD AND REMAND FOR NEW ARBITRATION HEARING

The relevant portion of Rule 60(b) on which appellant based its motion reads as follows:

“(b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . .; (4) the judgment is void; (5) the judgment has been satisfied, etc. . . .; or (6) *any other reason justifying relief from the operation of the judgment.* [Emphasis added] The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than a year after the judgment, order or proceeding was entered or taken.”

More specifically, appellant is relying upon the underlined subsection (6) of paragraph (b), namely, “any other reason justifying relief from the operation of the judgment.” Initially, appellant had thought in terms of proceeding under subsection (2) of Rule 60(b)—newly discovered evidence—but further research into the meaning of “newly discovered evidence” indicates that it is not applicable to the present situation. Here, the testimony of Mrs. Patricia F. Chatham is not newly discovered, in

the literal sense, but rather "newly available." In these circumstances, the relevant subsection is (6) which—in the words of Professor Moore—is the "grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses [i.e., clauses (1) through (5)], or when it is uncertain that one or more of the preceding clauses afford relief. . . ." *Moore's Federal Practice*, Volume 7, 60.27[2], at page 308.⁹ Or, as stated in Barron and Holtzoff: "The broad language [of (6)] gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice." Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, Sec. 1329 at page 417.

Rule 60(b) is required to be "liberally construed, in order that judgments may reflect the true merits of the case." Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, Sec. 1322, at page 392. As this Court of Appeals has stated it: "In our opinion, Rules 55(c) and 60(b) should be given a liberal interpretation." *Barber v. Turberville*, 94 U.S. App. D.C. 335, 218 F.2d 34. And in *Bridoux v. Eastern Airlines, Inc.*, 93 U.S. App. D.C. 369, 214 F. 2d 207, the Court declared that Rule 60(b) "does bring to bear a more liberal attitude than pertained before its adoption" and that "the 'other reason clause' of Rule 60(b) [on which plaintiff relies] . . . enables a court to vacate a judgment whenever such action 'is appropriate to accomplish justice'." ¹⁰

⁹ *Klaprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266; *In Re Cremidas' Estate*, 14 F.R.D. 15; *Pierre v. Bernuth, Lembcke Co.*, 20 F.R.D. 116; *Bridoux v. Eastern Airlines, Inc.*, 93 U.S. App. D.C. 369, 214 F.2d 207; *Toser v. Charles A. Krause Milling Co.*, 189 F.2d 243; *U. S. v. Williams*, 109 F.Supp. 456, 461; *Radaack v. Norwegian America Line Agency, Inc.*, C.A. 2d, 1963, 318 F.2d 538, 542.

¹⁰ See also: *In Re Cremidas' Estate*, 14 F.R.D. 15: "Most recent cases applying the rule with which we are here concerned have uniformly held for its liberal construction. . . ." To the same effect: *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863; *Toser v. Chas. A. Krause Milling Co.*, 189 F.2d 242; *Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531.

In applying this principle of liberal construction, the courts have held that, under Rule 60(b)(6), a judgment should be set aside where, for reasons outside his control, plaintiff did not have an opportunity to present all facts available to support his position and therefore has been denied an opportunity to have his case decided on the merits after a fair and full hearing. Thus, *In Re Cremidas' Estate*, 14 F.R.D., the court, relying on Subsection (6) of Rule 60(b), vacated an order and remanded the cause for a new hearing to receive evidence which, through no fault of plaintiff, was not available to be presented the first time around. In doing so, the court stated in words directly pertinent here:

"Most recent cases applying the rule with which we are here concerned have uniformly held for its liberal construction so that any case presenting the question of substantial rights should be resolved in favor of the petition to set aside a judgment where a litigant has not been afforded an opportunity to have his case decided on the merits. *Tozer v. Chas. A. Krause Milling Co.*, 189 F.2d 242. Under this principle, a litigant is entitled to a fair hearing *which presupposes an opportunity to present all the facts available in support of his position.* [Emphasis added] . . . The power vested in the courts under Rule 60(b)(6) is sufficient to enable them to vacate judgments wherever such action is appropriate to accomplish justice. *Klaprott v. U. S.*, 335 U.S. 601, 69 S. Ct. 384."

To the same effect is *Patapoff v. Vollstedt's, Inc.*, 267 F. 2d 863, where, under Rule 60(b)(6), the court vacated a judgment because, through no fault of her own, plaintiff did not put in certain evidence during the hearing. The court remanded the case for a new hearing to give plaintiff the opportunity to present this evidence.

These principles are especially applicable to the instant situation. Through no fault of its own, appellant was unable to present at the arbitration hearing the testimony

of Mrs. Patricia Firestone Chatham. Mrs. Chatham refused the request of appellant's counsel to appear, and her appearance could not be compelled, because subpoenas are not available in private arbitration proceedings in the District of Columbia. Mrs. Chatham is now ready, willing and able to testify.

As noted in the Statement of the Case, Mrs. Chatham will testify on the critical and central issues of the case, namely, whether Mrs. McLendon's use of the Blue report was (as the company contended) fraudulent and deliberately deceitful because she knew it belonged to the Fine Arts Commission but did not obtain the Commission's permission to use it; or, whether (as the Guild contended), Mrs. McLendon honestly and reasonably believed that it belonged to Mrs. Chatham, the owner of Prospect House, in which case her use of it, with Mrs. Chatham's authorization, could not be considered fraudulent or deliberately deceitful.

Mrs. Chatham's testimony will, as her affidavit shows, strongly and unequivocally support appellant's contention. There was *no* testimony on this critical issue available to appellant at the arbitration hearing except the self-serving testimony of Mrs. McLendon which the Arbitrator rejected. Thus, the sole independent witness to these central factors is now available to testify, and her testimony will unequivocally support appellant's contention which had been rejected by the Arbitrator.

The test for vacating a final order under Subsection (6) of Rule 60(b) is stated by Professor Moore in these words: "... clause (6) should be liberally applied to situations not covered by the preceding five clauses, so that, giving due regard to the sound interest underlying the finality of judgments, the district court, nevertheless, has power to grant relief from a judgment whenever, under all the surrounding circumstances such action is appropriate in the furtherance of justice." *Moore's Federal Practice*, Vol. 7, 60.27(1). Mrs. Chatham's testimony obviously

meets this test, for it goes directly to a critical issue in the case and directly contradicts the finding of the arbitrator on that issue. And, it is "of such a material and controlling nature as would probably induce a different conclusion." [*Moore's Federal Practice*, Vol. 7, 60.23[4].]

Moreover, "the discretion (in vacating a judgment under Rule 60(b)) should ordinarily incline towards granting rather than denying relief, especially [as here] if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. Equitable principles may be a guide in administering relief." Barron & Holtzoff, 3 *Federal Practice & Procedure*, Section 1323, at p. 253. In the instant case, the denial of a new hearing would be grossly unfair and prejudicial to Mrs. McLendon, whereas the grant of same would be no more than an inconvenience to the company. In such circumstances, the discretion of the Court should be exercised in favor of a new hearing. Moreover, the denial of a new hearing would allow Mrs. McLendon to be the victim of a serious inadequacy in due process in arbitration in the District of Columbia, namely, the absence of subpoena power to compel testimony. It is within the power of this Court to cure that inequity in the instant case, and, in view of all the surrounding circumstances, that power should be exercised.

In these circumstances, Rule 60(b)(6) plainly entitles appellant as a matter of law to a new arbitration hearing. A lifetime professional career is at stake in this case, and a failure to give appellant an opportunity to have Mrs. Chatham's testimony admitted and considered would amount to a failure to afford her a full and fair hearing on the merits and thereby result in a gross miscarriage of justice.

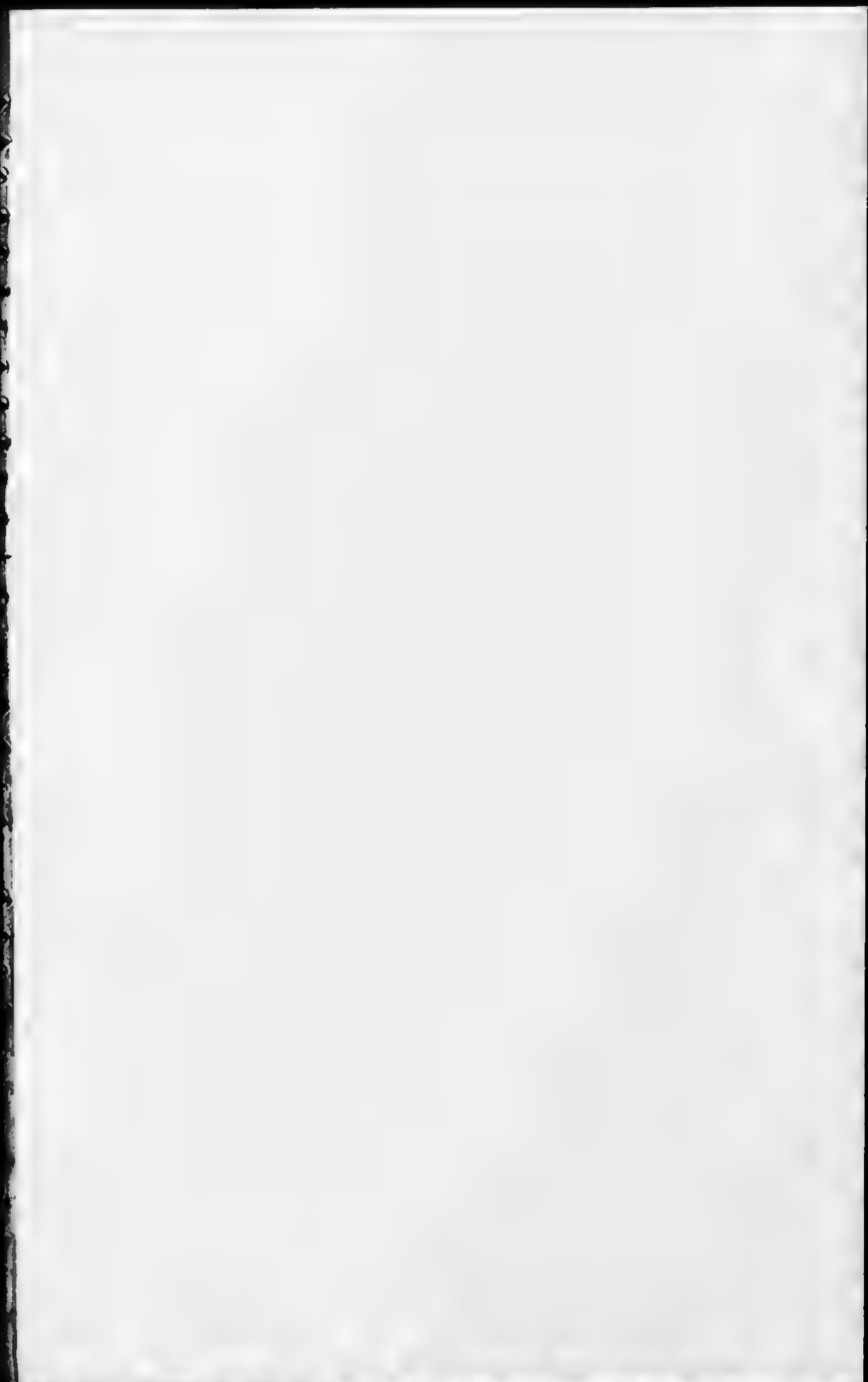
Respectfully submitted,

SPELMAN, LECHNER AND WAGNER

By SEYMOUR J. SPELMAN

Counsel for Appellant

April 15, 1970.



UNITED STATES DISTRICT COURT

WILLIAM G. BROWN, JR.,

vs.

THE WASHINGTON POST

Washington, D.C. National Newspaper Guild

Local 35, Appellant

v.

THE WASHINGTON POST

Counsel for

STATEMENT OF QUESTIONS PRESENTED

1. Whether the arbitrator decided the issue the Appellant asked him to decide when, after grieving in a common discharge case that an employee had not been discharged for good and sufficient cause, Appellant expressly submitted the same grievance to arbitration under Articles XVII and VI(3) of the collective bargaining agreement between the parties; whether the contract gave the arbitrator authority to make the award he made.

2. Whether the arbitrator engaged in misconduct or deprived a party of a fair hearing in excluding as immaterial the answer to a question Appellant believed relevant to the common law of plagiarism when the issue presented was whether the discharged employee had violated an obligation to the employer warranting discharge under Article VI(3) of the collective bargaining agreement; whether the Appellant's contention re the materiality of such evidence is anything more than an argument that (1) the arbitrator made a mistake of law, (2) the arbitrator is not the judge of the materiality of evidence, and (3) the arbitrator is not the sole determiner of the merits of a case in arbitration.

3. Whether the parties to a collective bargaining agreement intend that the Federal Rules of Civil Procedure shall govern their private autonomous arbitration or that final awards may be vacated by a court because a party alleges "the probability that newly discovered (available) evidence would result in a reversal of the award"; whether request for a new arbitration on such grounds is anything more than a request to the court to review the merits of the arbitrator's award and the alleged evidence.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,398; 23,980

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
LOCAL 35, *Appellant*

v.

THE WASHINGTON POST COMPANY, *Appellee*

On Appeal from the Decision of the United States District
Court for the District of Columbia

~~REPLY~~ BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Mrs. Winzola McLendon was discharged October 19, 1967. A grievance conference was held the same day. Appellant demanded immediate reinstatement because, in its words, "The firing was precipitate and without grounds under the contract, which provides: 'No employee shall be discharged except for good and sufficient cause.'" Post Unit Chairman's Report No. 4, dated October 23, 1967, Appellee's Statement of Material Facts, p. 2, App. pp. 92, 109.

In his affidavit in support of the Appellee's Statement of Material Facts, Mr. Lawrence Kennelly, Assistant General Manager for Personnel and Labor Relations, stated:

" * * * A grievance conference was held at the request of the Guild on October 19, 1967, the day of the discharge. At the grievance conference the Guild asserted that the discharge grievance arose under Article VI(3) of the collective bargaining agreement and that Mrs. McLendon was not discharged for good and sufficient cause. The Union demanded reinstatement, thus making clear that its contention was that McLendon should not have been discharged at all because there was not good and sufficient cause." * * *

"The Guild asked what was the reason for the discharge of Mrs. McLendon. The Chairman, Mr. Reistrup, said the discharge was precipitate and was not for any grounds under the contract.

I suggested that we look at the contract, and I read from Section (3) of Article VI—saying that the contract provides that no employee shall be discharged except for good and sufficient cause. I then explained the facts in our possession concerning how she had written the article for the September 10 issue of The Washington Post and what happened as a result. I was asked by Mr. Reistrup why we discharged her and I said, 'she was discharged for plagiarism which we consider gross misconduct.' The Guild asked for her immediate reinstatement which we denied. The Guild said it was going to arbitration and asked us to waive the five day waiting period under Article XVII so that it could proceed to the American Arbitration Association for a panel of Arbitrators. We agreed to this."

"The Guild, through its Attorney, asked us to give them the reason for the discharge and a letter from the Managing Editor was sent out [on October 26, 1967].

At the October 19, 1967, conference it was agreed between the Publisher and the Guild that the arbitration request would be submitted and at no time was there any discussion limiting or subtracting from the jurisdiction of the arbitrator in any way." * * *

Article VI(3) of the contract (below, pp. 3, 4) provides that the publisher shall reinstate an employee with full pay from the date of discharge if, upon conference, a discharge is found by mutual agreement not to have been based on good and sufficient cause. But if the publisher does not elect to reinstate he may still discharge with dismissal indemnity in addition to severance pay. There was no such mutual agreement to reinstate.

On October 20, 1967, the Guild submitted a demand for arbitration under the terms of Article VI(3) and Article XVII of the collective bargaining agreement,

"Under the terms of Article XVII and Article VI paragraph 3 of the Washington Post-Guild contract, the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a women's page reporter, for 'gross misconduct' to arbitration."

"The alleged misconduct involved an unproved charge of plagiarism against Mrs. McLendon. The Guild maintains that the discharge was not for good and sufficient cause." App. p. 85

Said Article XVII provides for a grievance arbitration procedure and expressly states,

"In a dispute arising from a discharge of an employee, the authority of the arbitrator shall be that specified in the Article VI of this agreement." App. pp. 93b, 118

Said Article VI reads in pertinent part,

"(3) No employee shall be discharged except for good and sufficient cause. * * * Two weeks notice in advance of discharge shall be given to employees with six (6) months or more of continuous employment except in cases of discharge for willful neglect of duty or gross misconduct. Any such employee upon receipt of notice of discharge, or upon discharge where no notice is given, may apply to the Standing Committee so that the Committee may confer with The Post in the case. If, upon conference, a discharge is found by mutual agreement not to have been based on good and sufficient cause, The Post shall restore

the discharged employee to his position, with full pay for the period from the date of discharge to date of reinstatement and with service record unimpaired.

* * * If, upon conference, The Post and the Guild are unable to agree as to the proper disposition of the case within thirty (30) days after notice of discharge, or after discharge where no notice is given, the matter may be referred by the Guild to arbitration under Paragraph (2) of Article XVII of this Agreement within fifteen (15) days after the end of such thirty (30) day period. If the Arbitrator renders an award that the discharge was not for good and sufficient cause, The Post shall be obligated either (a) to restore the discharged employee to his position with full pay for the period from the date of discharge to the date of reinstatement and with service record unimpaired, or (b) at the option of The Post to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI and a dismissal indemnity computed in accordance with the following schedule:

<i>Period of Service</i>	<i>Dismissal Indemnity</i>
--------------------------	----------------------------

[Schedule omitted]

* * * If the Arbitrator renders an award holding only that the discharge was not for willful neglect of duty or gross misconduct, The Post shall be obligated to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI." App. pp. 93a, 115

Article X of the agreement referred to in the last sentence of Article VI(3) reads, in pertinent part:

"ARTICLE X—SEVERANCE PAY

"(1) When an employee who has served The Post more than six (6) consecutive months in his latest period of employment is discharged for any reason other than willful neglect of duty or gross misconduct, he shall be paid, in addition to all other amounts due him, one (1) week's salary for each six (6) months,

and major fraction thereof, of his latest period of continuous employment * * * App. p. 117

See Contract attached to Complaint Ex. A, App. p. 84.

In his affidavit in support of the Appellee's Statement of Material Facts, Mr. Kennelly stated with respect to Article XVII (2) and Article VI:

"4. Article XVII(2) of said collective bargaining agreement provides that in a dispute arising from a discharge of an employee, the authority of the arbitrator shall be that specified in Article VI of this agreement. It is the established, consistent and well understood practice between plaintiff and defendant that discharge cases are handled in the following way by reason of the mutual agreement contained in Article VI:

(1) If upon grievance conference the discharge is found by mutual agreement not to have been based on good and sufficient cause, the discharged employee is entitled to reinstatement with full pay and service record unimpaired.

(2) If upon conference the Publisher and the Guild are unable to agree as to the proper disposition of the discharge grievance, the matter may be referred by the Guild to arbitration under Article XVII(2) of the agreement.

(3) The jurisdiction of the arbitrator in a discharge case is defined by mutual agreement of the parties as follows:

(a) If the arbitrator renders an award that the discharge was not for good and sufficient cause, the Publisher would be obligated either

(i) to restore the discharged employee to his position with full pay and with service record unimpaired, or

(ii) at the option of the Publisher to pay the discharged employee any sums due him at the time as severance pay under Article X of the agreement and further as payment in lieu of notice required under Article VI(3) and

(iii) as a dismissal indemnity an amount computed according to a schedule set out in Article VI(3).

(b) If the arbitrator were to render an award holding only that the discharge was not for willful neglect of duty or gross misconduct, but was for good and sufficient cause, the employee is entitled to payment of severance pay as provided in Item (a)(ii) above but the Publisher does not have to pay the employee the indemnity schedule provided for in (3)(a)(iii) of this paragraph 4.

* * * * *

See App. pp. 87-89 and 107.

On October 26, 1967, after receiving the April 20, 1967 demand for arbitration the Appellee wrote to the grievant as follows:

"Dear Mrs. McLendon: Pursuant to a request made on your behalf by Mr. Ira Lechner, attorney for the Washington-Baltimore Newspaper Guild, this is to advise you that you were discharged on October 19, 1967 for gross misconduct, in that in the preparation of the article on Prospect House published in The Washington Post on September 10, 1967, you committed the act of plagiarism." App. p. 114

The arbitration took three days with 550 pages of testimony. An experienced and respected arbitrator, Mr. Stein opened his 28-page Decision with reference to Article VI(3) of the collective bargaining agreement and Article XVII(2) as the provisions under which the issue was to be determined and the source of his authority. He then stated the issue for determination,—

"As stated at the hearing by counsel for the Publisher, 'The issue for determination in this proceeding is whether the dismissal of Mrs. McLendon was justified under the provisions of the applicable agreement.' " Arb. Opinion, p. 1.* App. p. 5.

* At the arbitration hearing the arbitrator requested opening statements from the parties. The Appellant did not challenge this statement of the issue and made no counterstatement. Statement of Material Facts, p. 7. App. p. 110.

The arbitration was held pursuant to the Voluntary Arbitration Rules of the American Arbitration Association. Rule 28 provides that the arbitrator shall be the judge of relevancy and materiality of evidence. Rule 31 provides that at the close of the hearing the arbitrator shall inquire whether there are any further proofs to offer or witnesses to be heard. Appellee's Motion for Summary Judgment, p. 7, App. p. 115. The arbitrator sustained an objection to a question Appellant's counsel asked a witness.

"Q. Back of your report there are some thirty foot-notes to a number of different sources.

A. Right.

Q. There are places within the report where quotes appear. Am I correct in assuming that the only materials here that are verbatim—

MR. SIEGEL: Dr. Stein, I would like to object.

DR. STEIN: Let him finish the question. If you would, hold your answer, Mrs. Blue.

Q. —that are verbatim were the source material surrounded by quotes?

DR. STEIN: I would sustain the objection. It would not make any difference if Mrs. Blue had lifted the whole report from the Britannica." Appellees Motion for Summary Judgment p. 6, App. p. 114.

In the three-day hearing this was the sole situation in which the arbitrator refused to consider an answer to a question by Appellant.

At no time during the arbitration did Appellant question the arbitrator's authority to fully resolve this discharge dispute as Article VI requires him to do. On the contrary, in its post-arbitration brief it repeatedly made clear that it wanted him to find that the discharge was not for good and sufficient cause. To illustrate,—in its post-hearing brief dated May 11, 1968 (Appellee's Statement of Materials Facts, p. 2) Appellant submitted the issue presented to the arbitrator under two headings:

"I. The Company's Alleged 'Standard' of Plagiarism Is at Variance With Common Practice at The Post and in the Industry At Large, Was Never Dissemi-

nated to Mrs. McLendon or the Reporting Staff, and Cannot Justify the Discharge." and

"II. Under the Circumstances, Discharge Was Too Excessive a Penalty To Constitute 'Good and Sufficient Cause.'" App. pp. 42, 53.

* * *

and "Assuming *arguendo* only that Mrs. McLendon violated good practice in her treatment of the Blue report in writing the Prospect story, *discharge was too severe a penalty to constitute 'good and sufficient cause.'*" (Union Brief to Arb., p. 15, App. p. 53), (Emphasis supplied.) and

"But to reach out and pluck off the head of an experienced reporter for allegedly violating ethical standards of which she and reporters at large are unaware *simply does not constitute 'good and sufficient cause' within the meaning of the collective bargaining agreement.*" (Union Brief to Arb., pp. 14-15, App. p. 53.) (Emphasis supplied.)

The Appellant concluded its brief as follows:

"What the Guild has sought to demonstrate is not that 'hearts and flowers' should prevail, *but rather that either no crime at all was committed or that when the punishment is assessed in the light of the alleged crime—when all the facts and circumstances are accounted for in this case—it is simply unconscionable for the discharge of Winzola McLendon to stand.*" (Emphasis supplied.)* App. p. 55.

* In its Memorandum of Points and Authorities to the District Court, the Appellee made a curious argument. It said: " * * * 'The issue is not what the parties now declare a grievance or dispute to be, but what they declared the grievance or dispute to be when they submitted it in writing to the arbitrators.' *Procter & Gamble Ind. Union v. Procter & Gamble*. [No citation.] Plaintiff would be happy here to be judged by that criterion." U. Points and Authorities, p. 11, fn. 17. App. p. 127.

In *Procter & Gamble Ind. Union v. Procter & Gamble* (1961 EDNY), 195 F. Supp. 64, the union grieved a violation of "past practices and agreements" concerning the wage to which one Spittel was entitled. In its complaint it alleged the past practices and agreements arose under the current contract. The court concluded the Spittel grievance was not subject to arbitration because the Union was bound by its grievance as submitted to the arbitrator and could not change the submission in its complaint.

The arbitrator's award dated April 12, 1968 was "The discharge of Mrs. Winzola McLendon was not for willful neglect of duty or gross misconduct, but it was for good and sufficient cause."

Appellee's Statement of Material Facts, p. 3, App. p. 111 stated:

"Following the issuance of the award the plaintiff, the grievant and Company representatives met on or about May 6, 1968, to compute the separation pay due grievant as required by the collective bargaining agreement under the award. The proper computation of the time worked by grievant for purposes of arithmetically determining separation pay was disputed. The matter was resolved by mutual agreement plus an additional voluntary adjustment to be paid by the Company. Said settlement agreement was confirmed by letter dated May 7, 1968, from Company to the Union. Grievant has received the money by depositing the checks paid her under the settlement agreement."

At no time has Appellant asked Appellee for a second arbitration on the basis that there was an issue yet to be decided which the parties had not intended to submit.*

The district court's order granting summary judgment in favor of Appellee directed dismissal of the complaint. The complaint asked for the vacation of the award in its entirety, the discharge of the arbitrator and the ordering of an arbitration *de novo* before a new arbitrator with instructions to receive and consider "newly discovered evidence." Further, on January 24, 1970, the district court issued its Memorandum and Order denying

* The Appellant opened its argument (U. Points and Authorities, p. 18) App. p. 130 that the arbitrator refused to admit material evidence with the following statement, "Mrs. McLendon was fired for alleged plagiarism in her use of what the company described as Mrs. Blue's literary composition." This is not a mere *lapsus linguae*. No matter how intricate a distinction Appellant seeks to make between degrees of culpability, Appellant knew Mrs. McLendon was discharged for the act of plagiarism and that gross misconduct encompasses good and sufficient cause, both being only degrees of culpability.

Appellant's motion under Rule 60(b) Fed. R. Civ. P. to vacate its order granting summary judgment and to remand the case for a new arbitration on the ground of newly discovered (available) evidence. Appellant asserted that the additional testimony would unquestionably compel a different result on the merits of the case.

STATEMENT OF POINTS

The trial court did not err in:

1. Denying Appellant's motion for summary judgment.
2. Refusing to remand the arbitrator's decision and award to be reopened to accept the answer to a question the arbitrator decided was not material to the discharge issue presented under the contract.
3. Refusing to grant a motion under Rule 60(b) Fed.R.Civ.P. to remand such award for a new arbitration on the ground that alleged additional testimony raised the probability that the arbitrator would reverse his decision.

SUMMARY OF ARGUMENT

This is an action by Appellant to compel a second arbitration of a discharge grievance once fully arbitrated. The parties bargained for arbitral finality in one arbitration proceeding in resolving discharge disputes, and Appellant is seeking here to upset this agreement.

This action arises under Section 301(a) of the Labor-Management Relations Act, as amended, 29 U.S.C., Sec. 185(a), and is controlled by the federal law of labor arbitration. Nowhere in its argument in the district court, or in its brief here does Appellant allude to this basic fact. Under controlling principles of federal law, a court may not review the merits of an arbitrator's award where the agreement between the parties provides for final and binding arbitration.

Appellant's Statement of the Case, plainly relates to the merits of the Award. Having sought to examine in ultimate

detail the merits of the arbitrators's award and thus entangle the Court into a reappraisal of the 550-page arbitration transcript, it is understandable that the Appellant makes the self-same factual arguments on the merits that it made in its post-hearing brief to the arbitrator.*

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L.Ed. 2d 1424, 80 S.Ct. 1358, the Supreme Court said: (at p. 1427)

"The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

The discharge of Mrs. McLendon for cause under the contract was the kind of dispute the parties agreed in advance would be submitted to final and binding arbitration. Their contractual agreement further delineated with unusual precision what the arbitrator should do. There is no claim by Appellant that there was an agreement or waiver of any kind to limit the contract requirements. All cases relied upon by Appellant clearly deal with situations where there is a restrictive contract clause expressly limiting the function and authority of the arbitrator particularly with respect to relief. Other courts have noted the distinction. *Machinists v. Campbell Soup Company*, (7 C.A. 1969) 406 F. 2d 1223, 70 LRRM 2570.

Nothing in the entire record of this case even remotely suggests the arbitrator did not decide what the Appellant expressly asked him to decide;—whether the discharge for plagiarism was proved and whether it constituted good and sufficient cause. In its post-hearing brief Appellant stated repetitively that the discharge was not for good and

* Appellant states, App. Br. fn. p. 4, that the 550-page transcript is part of the record. The district court did not have the transcript for review and *properly* did not examine it. It has not been given to either court as a part of the record before it.

sufficient cause, and it asked for reinstatement with back pay for that reason.

The matter has been well summed up by the 5th Circuit in *Safeway Stores v. Bakery Workers, Local 111*, (5 C.A. 1968) 390 F. 2d 79 at pp. 82-84. The Court said:

"We emphasize again and again, as we have before, *Dallas Typographical Union v. A. H. Belo Corp., supra*, at 581; *Boeing Co. v. International Ass'n of Machinists*, 5 Cir. 1967, 381 F. 2d 119, that cases of the type pressed so heavily on us by the Employer must not be read to justify the court resuming its traditional role of assaying the judicial acceptability of the award had it been a court judgment."

"As these admonitions are addressed primarily to ourselves as Judges on the trial and appellate fronts we should heed them by resisting the temptation to 'reason out' a la judges the arbiter's award to see if it passes muster. So it is here. * * *"

* * *

"The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."

The arbitration record shows that (1) the arbitrator did not exceed his authority; (2) he did not make an error of law; (3) he did not refuse to receive material and relevant evidence; (4) he did not act arbitrarily, capriciously and irrationally as the Appellant still claims; (5) questions of law and fact relate to the merits of a case and are for the arbitrator to decide; (6) the parties bargained for finality in one arbitration proceeding and the arbitrator fully permitted all witnesses to testify whom the Appellant called; (7) arbitration proceedings once finally concluded cannot be reopened because the losing party would like to restructure its case in the light of its loss; (8) it is beyond the wildest contemplation of parties to a collective bargaining agreement that a final arbitration award interpreting the provision of a collective bargaining agreement would be subject to the Federal Rules of Civil Procedure.

With respect to the Appellant's afterthought of seeking for the second time to produce additional evidence after the adverse award was implemented and settled, Rule 60(b) F.R.C.P. has not been a reason under any applicable principles of labor law justifying relief from the operation of final labor arbitration. Hence, it was not a reason for the district court under Rule 60(b), F.R.C.P. to set aside its order granting summary judgment. No court has ever recognized it to be a reason to nullify an award.

The district court had already rejected by the application of Section 301(a) principles Appellant's desire to reopen a final arbitration award on "newly discovered evidence" going to the merits of the litigation when the Appellant shifted to Rule 60(b) to seek the new arbitration on the basis of other "newly discovered evidence." App. p. 83, para. 8. The second claim of newly discovered (available) evidence like the first makes no claim that it was the arbitrator who misconducted himself with respect to this claim.

The 5th Circuit, in *Paper Mill Workers v. St. Regis Paper Co.* (5 C.A. 1966), 362 F. 2d 711, said:

"We think it is settled law that an award of an arbitrator under an arbitration provision in a collective bargaining agreement, which provides the arbitrator's decision shall be final and binding on the parties, is not open to review on the merits. The merits embrace not only asserted errors in determining the credibility of witnesses, the weight to be given their testimony, and the determination of factual issues but also the construction and application of the collective bargaining agreement . . ."

The parties accepted and implemented the award. The court need not reach this point, but in this sense this case is moot.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT ERROR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND BY DENYING APPELLANT'S CROSS MOTION

A. The Arbitration and Award Meet All the Applicable Legal Standards and Cannot Be Vacated or Modified

In a suit testing the validity of an arbitration award a court may not review the merits of the award, but must confine its inquiries to the limited questions of:

(1) Whether the applicable agreement conferred upon the arbitrator authority to reach the award rendered and whether the dispute was one that the parties agreed to arbitrate;*

(2) Whether the arbitrator in the conduct of the hearing engaged in misconduct such as corruption, fraud or undue means so as to deprive a party of a fair hearing by his or other parties' acts. A court may not set aside an arbitration award or permit a new adjudicatory proceeding simply because evidence was refused admission or because it is alleged that an error of law was made by the arbitrator or because a party wishes to restructure and rebuild its case by the introduction of additional evidence.

* In *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra*, the Supreme Court pointed out that it is not a function of the courts to review the merits of the construction of a collective bargaining agreement; "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steel Workers v. American Mfg. Co.*, 363 U.S. 564, 80 Sup. Ct. 1343, 4 L. Ed. 2d 1403. Same, *Dallas Typographical Union v. A. H. Belo Corp.*, 372 F. 2d 577 (5 C.A. 1967); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 Sup. Ct. 1347, 4 L. Ed. 2d 1409; *International Association of Machinists v. Hayes Corp.*, 296 F. 2d 238 (5 C.A. 1968); *Safeway Stores v. Bakery Workers, Local 111*, 390 F. 2d 79 (5 C.A. 1968); *Fischer v. Guaranteed Concrete Co.*, — Minn. — (1967), 151 N.W. 2d 266; *Kroger Co. v. Teamsters Local 661*, 380 F. 2d 728 (6 C.A. 1967); *Garment Workers v. Beauty Bilt Lingerie, Inc.* (D.C. N.Y. 1961), 48 LERM 2995; *Paper Mill Workers v. St. Regis Paper Co.*, 362 F. 2d 711 (5 C.A. 1966); *Morceau v. Gould-National Batteries, Inc.*, 181 N.E. 2d 664, 344 Mass. 120 (1962); *Jennings v. Westinghouse Electric Corp.*, 283 F. Supp. 308 at p. 312 (S.D. N.Y. 1968).

See, *Stereotypers v. Newark Morning Ledger Co.*, 261 F. Supp. 832 (D.C. N.J. 1966), *aff'd.* 397 F. 2d 594; *Paper Mill Workers v. St. Regis Paper Co.*, 362 F. 2d 711, (5 C.A. 1966); *Lodge No. 12, District No. 37, I.A.M. v. Cameron Iron Workers*, 292 F. 2d 112 (5 C.A. 1961); *Truck Drivers v. Acme Markets*, E.D. Pa., (1967), 65 LRRM 2708, F. Supp. . *Ficek v. Southern Pacific Co.*, 338 F.2d 655 at p. 657, (9 C.A. 1964), *cert. den.* 380 U.S. 988; *Textile Wkrs. of America v. American Thread Co.*, 291 F. 2d 894 at p. 896 (4 C.A. 1961); *Fischer v. Guaranteed Concrete Co.*, — Minn. —, 151 N.W. 2d 266 (1967); *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (3 C.A. 1954); *San Martine Compania de Nav. v. Saguenay Term Ltd.*, 293 F. 2d 796 (9 C.A. 1961).

B. Aside from the Clear Principles of Federal Law of Labor Arbitration Under Section 301(a) LRMA Barring a Second Arbitration, the Appellant, Appellee, and Grievant Accepted and Implemented the Award

Appellee acted pursuant to its compulsory force in paying severance pay to the grievant. If the Appellant or Mrs. McLendon believed she was still entitled to reinstatement after the Award, they certainly acted inconsistently in accepting severance pay without protest. The calling for and holding a settlement conference could have been without pre-prejudice to anyone's rights as Appellant's counsel has claimed. To the extent that Appellant still harbored misgivings about the arbitrator's award, which might be natural to the losing party, the upshot of the matter was that the grievant, with the full knowledge of Appellant, accepted and abided by it.

C. The Dispute Was Clearly One Which the Parties Agreed in the Contract To Arbitrate and No Limitation Was Placed on the Arbitrator's Authority To Determine Whether the Discharge Violated the Contract

There can be no question that unresolved discharges are grievances intended by the parties to be resolved by arbitration. Articles VI(3) and XVII of the contract are too

clear to require argument. In numerous cases of analytical similarity, after an arbitration has been held the courts have dismissed complaints seeking second arbitrations because a party offers in support of his claim that there were issues or grounds that were or could have been raised in the same grievance that were left for further arbitration.

Todd Shipyards Corp. v. Industrial Union of Marine & Ship Wkrs., 242 F. Supp. 606 (D.C. N.J. 1965); *Goldstein v. Doft*, 236 F. Supp. 730 (S.D. N.Y. 1964), *aff'd per curiam*, 353 F. 2d 484, *cert. den.* 16 L. Ed. 2d 302, 86 Sup.Ct. 1226; *Ficek v. Southern Pacific Company*, 338 F. 2d 655 (9 C.A. 1964), *cert. den.* 380 U.S. 988, *Union Hardware Division v. Local 247, I.U.E.*, (U.S. D.C. Conn. 1968) — F. Supp. —, 67 LRRM 2541; * *United Steelworkers v. Northwest Steel Rolling Mills, Inc.*, 324 F. 2d 479 (9 C.A. 1963).

A reiterated theme of Appellant is that Appellee did not say that if the arbitrator did not find Mrs. McLendon guilty of "gross misconduct", he should find "good and sufficient cause", for discharge. (We shall demonstrate that Appellee did.) This talking point of Appellant is hardly an argument. At no time does Appellant deny that in its grievance and in its demand for arbitration and in its brief to the arbitrator it presented the total issue of discharge. In bringing the McLendon discharge grievance to arbitration, Appellant expressly demanded arbitration on the basis of Article VI(3) and XVII of the contract and no limitation was placed on that authority. Appellant conveniently overlooks the fact that this arbitration was based on a grievance it brought and structured to meet the requirements of the contract. In some mysterious way it assumes that it was the Appellee who controlled the way in which Appellant framed and presented its grievance to the arbitrator and defined the issue in its brief.

Everyone knew that the arbitrator would have to decide under the contract that (1) there was no ground for discharge at all, or (2) that there were sufficient grounds but

* Apparently unreported in Federal Reporter System.

(3) the grounds were not sufficient to relieve the employer from paying severance pay as the contract requires, and in such order. The Appellant was fighting in the arbitration to see that Mrs. McLendon was not discharged at all. The Appellee was seeking to establish that it did not have to pay severance pay. For even if the arbitrator found there was not sufficient cause, the employer could elect to pay terminal indemnity instead of reinstatement. If there ever was a case where the contract clearly draws the issue, this is the case.

But to the extent that the Appellant represents to the court that a reading of Appellee's brief to the arbitrator would "nowhere reveal" that the parties had not intended to present the total issue of discharge to the arbitrator, such a representation, so strongly made, is just not so. Appellee opened its brief to the arbitrator with a statement of the issue:

"The issue before the arbitrator in this case is: 'Whether the dismissal of Mrs. Winzola McLendon was justified under the provisions of the applicable labor agreement.' " (p. 1) App. p. 56

Appellee opened its argument with the following statement:

"The basic issue in this dispute is whether Mrs. McLendon was properly discharged under the applicable labor agreement for the use she made of the Blue report in preparing her article on Prospect House. The Company contends that such use was gross misconduct, constituting plagiarism*, and, upon discovery and verification, fully warranted her discharge without severance pay." App. p. 61

The Appellee added in a footnote:

"While plagiarism is the apt description of the misconduct involved, it is clear that this grievance cannot be resolved solely by a determination whether the conduct is plagiarism in its customary legal sense, although the legal rules are relevant and material in appraising Mrs. McLendon's conduct. Under the applicable contract (Jt. Ex. 1, Article VI, Par. (3)), the

discharge was for gross misconduct, and its justification depends upon the appropriate evaluation of all the pertinent facts involved in Mrs. McLendon's actual use of the Blue report in her article." (pp. 7, 8), App. p. 61.

Numerous references are made to the fact that Mrs. McLendon was discharged for plagiarism and that the misconduct justified the discharge. For example,

"All that is required to justify the discharge is to establish the simple facts that Mrs. McLendon did, without disclosure to her employer and its readers, copy from the Blue report that magnitude of material which the pertinent documents reveal are identical or similar in each." * * * "Nothing in this record excuses or justifies the plain misconduct of Mrs. McLendon's performance." p. 8, App. p. 62.

"It is, of course, the Company's position that all of the material taken from the Blue report stands on the same footing in respect to the conduct for which Mrs. McLendon was discharged." p. 12, App. p. 65.

"Whether the use of another's writings constitutes misconduct warranting discharge by the Post depends on several factors." p. 13, App. p. 66.

"Mrs. McLendon's massive deceit in the preparation of her Prospect House article has destroyed her ability to continue as an employee of the company When that trust is broken, the editor has only one choice. He must discharge the writer who has perpetrated such a fraud upon him and the readers." p. 16, App. p. 69.

"In its efforts to protect Mrs. McLendon from the consequences of her actions, the Guild has sought to prove that this discharge was unjustified." p. 18, App. p. 70.

"It is one thing for a reporter to take or paraphrase from one or more historical sources a few factual statements, and fail to credit his source. This would be poor or "sloppy practice", *but probably not sufficient cause* for discharge. It is quite another thing for Mrs. McLendon to have copied, from a single non-historical and non-public source, so extensively as she did. (Tr. pp. 228-231, 373-375)." (Emphasis supplied.) p. 22, App. p. 74.

D. The Arbitrator Did Not Exceed His Authority But Did Precisely What the Parties Mutually Agreed That He Should Do in a Discharge Case

Despite the Appellant's efforts to complicate this case, it remains in truth quite simple. The Appellant refuses to accept its loss in the arbitration and desperately seeks to upset its agreed upon finality. The entire thrust of Appellant's case rests upon a fabricated premise that Mrs. McLendon was discharged on the "grounds" of "gross misconduct." (1) Gross misconduct is not a "ground" for discharge, but a degree of seriousness for a discharge defined in the applicable contract and having different consequences in terms of severance pay and terminal indemnity pay from a discharge for "good and sufficient cause"; (2) the "grounds" for discharge were Mrs. McLendon's acts in preparing the Prospect House article, characterized by Appellee as "plagiarism" and constituting in the judgment of the Appellee not only good and sufficient cause for discharge under the contract, but, in addition, "gross misconduct" and, (3) the basic issue before the arbitrator was whether the discharge was justified under the contract.

It was totally unnecessary for the Appellee to argue that the facts at least added up to good and sufficient cause for discharge. Under the governing contract provisions this was implicit in the position of the Appellee and the Appellant knew this when it grieved, when it discussed the case with company officials before requesting arbitration, when it submitted the discharge grievance to arbitration, when it tried the case before the arbitrator, and when it briefed the case after the hearings.*

* Under this agreement the only way the arbitrator can be deemed to have had submitted to him only the issue of "gross misconduct" is if the Appellant conceded, as is sometimes the case in this kind of discharge case, that the discharge was for good and sufficient cause but contended that the employee is still entitled to severance payments. No one could scarcely have understood the Appellant to have made such a concession in this case from the grievance conference, its demand for arbitration, and the presentation of its case to the arbitrator.

The labor arbitration cases referred to by the Appellant plainly do not factually resemble the instant case and have no relevance to it. They are all cases in which the labor agreement, as well as the agreed upon submission of the issue, expressly restricted what the arbitrator should do.

In *Lee v. Olin Mathieson Chemical Corporation*, (WD Va. 1967) 271 F. Supp. 635, *there was an agreed upon submission* of the issue which expressly limited the arbitrator to an interpretation of Contract Article V, Section 18. The parties had also agreed in advance in the contract that the arbitrator's jurisdiction *must be limited* by the submission. Finding no violation of Article V, Section 18, the arbitrator decided that provisions other than Article V, Section 18 had been violated. To the same effect is *Polycast Corp. v. Local 8-102, Oil Workers*, 59 LRRM 2572, (Conn. Superior Court), *Stove Mounters Union v. Rheem Mfg. Co.*, 32 LA 266 (1959), California Lower Circuit Court.

It is unnecessary here to conjecture about the scope of Arbitrator Stein's jurisdiction;—it is expressly defined in Article VI(3) of the contract. But if it were necessary to pursue this question the language and reasoning of the 3rd Circuit in the recent case of *H. K. Porter Co. v. Saw Workers*, (3 C.A. 1969), 406 F. 2d 643, 70 LRRM 2383, is particularly appropriate in answer to the Appellant's claim that not everything in this dispute was given to the arbitrator to decide. In *Porter Co. v. Saw Workers*, the arbitrator decided matters related to the issue, but not (contrary to the case here) clearly defined in the contract itself as being a part of his obligation. Nonetheless, the court said:

"The two questions, when an employee was entitled to pension and when the right to payment of pension benefits accrued, are at least so interwoven in the circumstances of this case that we cannot say that § XX-B alone requires their elimination from the scope of the arbitration."

In *Lynchburg Foundry Co. v. Steelworkers*, (W.D. Va. 1968), 285 F. Supp. 59, 68 LRRM 2379, the arbitrator de-

cided that the discharge was not justified; not, as in the instant case, that it was. The district court held the arbitrator could not change the contractual relief provided in the contract by denying back pay. While Appellant apparently cites this case as support for its position, it does not. Moreover, the district court was reversed by the Fourth Circuit on the ground that the arbitrator having found the discharge unjust did have authority to fashion the appropriate relief. *Lynchburg Foundry v. United Steelworkers*, (4 C.A. 1968), 404 F. 2d 259.

In *Textile Workers of America v. American Thread Co.*, (4 C.A. 1961) 291 F. 2d 894, there was a stipulated submission. The arbitrator, having found that the employer had just cause to discharge, was not authorized under express provisions of the contract to pass upon the appropriateness of the employer's disciplinary action.

In *Machinists v. Campbell Soup Company*, (7 C.A. 1969), 406 F. 2d 1223, 70 LRRM 2570, the court found the arbitrator's authority had not been restricted. It looked at the same cases cited by the Appellant and distinguished them, including *American Thread Co.*, as follows:

"The principle distinction between these cases and the case before us is that there is no restricted clause expressly limiting the function and authority of the arbitrator."

Had the arbitrator ruled there was not sufficient cause for discharge and the employer had questioned the scope of the arbitrator's authority, the outcry the Appellant would have made that the arbitrator did precisely what the contract requires and the Appellant asked for in its October 26, 1967 demand for arbitration is only too apparent. Nor would Appellee go through one arbitration proceeding only to find that Appellant had reservations it was reserving for a second one. Appellant asks as alternative relief here that this same grievance be sent back to the arbitrator to permit him to reverse himself on the merits. If an arbitrator could make such decision in a second arbitration, he could have made it the first time.

E. The Arbitrator Did Not Exclude Material Evidence and He Did Not Act Improperly

In its original complaint, Appellant alleged that the arbitrator made a mistake of law. And it was only to such mistake of law that the alleged exclusion of an answer to a question was material. After Appellee moved for summary judgment showing that arbitrators are not bound by rules of law but are only required to apply the contract, Appellant dropped the allegation of a mistake of law but left dangling the alleged failure to hear an answer to a question that had to do with Appellant's contention concerning the common law of plagiarism. App. p. 83, para. 7.

The arbitrator made no mistake of law. He was concerned with applying a labor agreement. By not permitting Appellant to cross-examine Mrs. Blue on whether she might have committed plagiarism herself in the preparation of her report, Mrs. McLendon was in no way denied a fair hearing. The question was what Mrs. McLendon, the discharged employee, had done with Mrs. Blue's report in preparing her newspaper article, and the arbitrator was clearly right in stating that even if Mrs. Blue had surreptitiously copied every word of it from another writer, in a most flagrant form of plagiarism, it could not alter what Mrs. McLendon had done in copying surreptitiously from Mrs. Blue. App. p. 74.

The "fundamental issue" in this discharge, as the Appellant well knows, was whether Mrs. McLendon's discharge was justified under the contract and, more specifically, whether her total conduct in preparing the Prospect House article constituted "good and sufficient" cause for discharge and, indeed, as the defendant contended, was of such serious nature that it constituted "gross misconduct" and justified her loss of severance pay.

There was an abundance of evidence to support the Arbitrator's decision and award in this case if it were appropriate to examine into the record evidence. Appellant is absolutely wrong in its claim that this evidence "goes to

the very heart of the matter" because there can be no "piracy of a piracy" in the field of plagiarism. As between pirates this might be true. But, as between an innocent employer and a plagiaristic employee it is only too evidently not true. In determining whether the defendant employer was justified in discharging Mrs. McLendon for *her* conduct in using Mrs. Blue's report as she did, where and how Mrs. Blue prepared her report was of absolutely no significance. The arbitrator so concluded and expressly so stated this to be his interpretation of the labor contract. This was not a suit for protection of property rights impaired by plagiarism. This was a discharge proceeding under familiar grievance and arbitration procedures established in repetitive contracts between the parties over many years.

In *Stereotypers v. Newark Morning Ledger*, *supra*, p. 15 the union contended that the award should be vacated for refusal of the arbitrator to accept evidence, as well as for fraud and for exceeding the arbitrator's authority. In denying the union's claim the court stated the clear rule in labor arbitration law:

"It is the general rule that the courts will refuse to review the merits of an arbitration award. It is true that the arbitrator is not free to ' . . . dispense his own brand of industrial justice' *United Steelworkers of America v. Enterprise Wheel & Car. Corp.*, *supra* at 597, but his interpretation and application of the collective bargaining agreement, and the arbitration which flows from such collective bargaining agreement, will not be questioned by the courts where the arbitrator has authority to act. . . . *The award may not be examined for alleged mistakes of law and erroneous evaluation of evidence.*" (Emphasis supplied by the court.) 261 F. Sup. 832, 835.

Harvey Aluminum, Inc. v. Steel Workers, (C.D. Cal. 1967) 263 F. Supp. 488, 64 LRRM 2580, referred to by Appellant is not factually similar. There was no question about the materiality of the evidence because the arbitrator

stated he deemed the evidence to be material, but he would not permit its admission in rebuttal rather than in a party's case-in-chief because of his own procedural preferences on when evidence should be presented in arbitrations. His notion about the rigidity of the sequence of proof went beyond anything courts insist upon. The refusal to permit recall of a witness was raised at the hearing, pressed and argued, briefed, and ruled upon expressly in the opinion of the arbitrator. In this case, upon objection made, Arbitrator Stein ruled the excluded evidence was immaterial and irrelevant to his determination and the Appellant never again until this suit objected to or mentioned this ruling.

II

THE DISTRICT COURT WAS NOT IN ERROR IN DENYING A MOTION MADE BY APPELLANT UNDER RULE 60(b) FED. R. CIV. P. TO VACATE AWARD AND REMAND FOR NEW ARBITRATION HEARING

A. The Appellant's Reason for Setting the Arbitrator's Award Aside Under Rule 60(b) and Remanding It for the Purpose of a New Arbitration Under That Rule Is Not a Reason Justifying Relief from the Operation of a Final Labor Arbitration Award Under Applicable Labor Law; Hence, It Was Not a Reason for the District Court To Set Aside Its Order for Summary Judgment

The part of Appellant's motion asking the district court to reopen its own order of June 9, 1969 might be brought by Appellant under Rule 60(b), but that part of its motion which asked the Court to remand an arbitrator's final award to an arbitrator for the purpose of hearing newly discovered evidence or any other evidence must be brought under Section 301(a) of the Labor-Management Relations Act, the same as the original complaint. Nowhere in the district court or in this appeal has Appellant identified the jurisdiction of this Court to review an arbitrator's award in a labor case. Because of this, Appellant's argument has been disoriented and disassociated from the controlling federal law of labor arbitration.

Despite its repeated denial in its motions for time extensions to file briefs that it was using Rule 60(b) in a double sense, Appellant is doing just that. It seeks to be relieved from the June 8, 1969 final order of the court by reason of a claim made under Rule 60(b), although such claim is clearly, even under Rule 60(b) without merit. But Appellant also wants Rule 60(b) to be used by the courts to set aside the finality of an arbitrator's awards because of alleged newly discovered (available) evidence as though the final award of an arbitrator under a contract were the same as a final judgment of a federal court after trial, which is subject to Rule 60(b). An arbitration award under a labor contract is not in this sense a final judgment of a federal court. The kind of review open to a court under Section 301 LMRA is severely limited. *United Steelworkers of America v. Enterprise Wheel and Car Co.*, 363 U.S. 593; *Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U.* (9th Cir. 1969), 412 F. 2d 899; *Gulf State Telephone Co. v. Local 1692*, 416 F. 2d 198 (5th Cir., Aug. 10, 1969) 72 LRRM 2026; *Safeway Stores v. American Bakery and Con. W.I.U.*, (5th Cir.) 390 F. 2d 79.

In labor arbitration discharge cases nothing is more common than the fact that persons with knowledge of a case may not want to testify. To say a party may await the outcome of such an arbitration and then persuade another and another witness to testify is the antithesis of labor arbitration policy under Section 301 of the LMRA.* There would be no end to discharge arbitration if final awards were reopened for something other than the arbitrator's or a party's misconduct.

* As discussed elsewhere there is nothing in the affidavit of Mrs. Chatham which in any way contradicts or brings in question any findings and conclusions of the arbitrator made on the basis of Mrs. McLendon's own testimony of her conversation with Mrs. Chatham, which the arbitrator clearly credited.

B. The Courts have Clearly Denied Second Arbitrations in Cases Such as This

The Appellant cites civil procedure cases to the effect that Rule 60(b) permits the vacation of a judgment after final order of a court. But the district court did not fail to consider any evidence in any trial in which it participated. Appellant simply joins together as the same thing the grounds for vacation of a court order with the grounds for setting aside an arbitrator's final award under a collective bargaining agreement. Appellant's brief is barren of any cases in which an arbitrator's award was vacated because a party wanted to call another witness.

In *Bridgeport Rolling Mills Company v. Brown*, (2 C.A. 1963) 314 F. 2d 885, *cert. denied*, 375 U.S. 821, an employer moved to vacate an adverse labor arbitration award on the ground of alleged newly discovered (available) evidence under Rule 60(b), Fed. R. Civ. P., and fraud in the procurement of the award. The employer, the losing party in the arbitration, claimed to possess evidence "uncovered" after the arbitration award which conclusively established the employee's complicity in a theft and rendered his testimony before an arbitrator perjurious. The employer claimed "sufficient" evidence was now available to justify a discharge.

In a per curiam opinion affirming judgment on the pleadings, the Court did not bother to get into the question of Rule 60(b). The court stated categorically that whatever good the newly available evidence might do the employer in some other proceeding such as a proceeding for conversion of property, as far as labor arbitration is concerned,

"We only hold that the parties, having agreed to arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator."

The rationale concerning the finality of private autonomous arbitration awards has been well stated in *La Valle*

Plaza, Inc. v. R. S. Noonan, Inc. (3 C.A. 1967) 378 F. 2d 569.

"It is an equally fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration. The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion. The continuity of judicial office and the tradition which surround judicial conduct is lacking in the isolated activity of an arbitrator, although even here the vast increase in the arbitration of labor disputes has created the office of the specialized professional arbitrator." * * *

A colorful expression of the principle favoring finality to arbitration awards can be found in the observations of Judge Weinfeld in *Goldstein v. Doft, supra*. In dismissing a claim before him which sought re-arbitration of a dispute which had previously been arbitrated and decided adversely to the plaintiff, Judge Weinfeld said, 236 F.Supp. at 734:

"To permit this suit to be maintained in the face of incontrovertible facts would make a shambles of the doctrine of *res judicata*—intended not only for the protection of litigants, but also in the interest of the State—indeed, it would give the plaintiff 'two bites of the cherry.' "

The Union more than two years ago submitted its case voluntarily to the arbitrator and closed the hearing as far as introduction of evidence was concerned. Today it relies upon a different concept of its evidence. And tomorrow it could claim that it will be at liberty to rely upon still another "equitable" ground under Rule 60(b) to upset the finality of the arbitrator's award. It is respectfully submitted that Judge Aubrey Robinson, following *Bridgeport Rolling Mills Company*, simply put Rule 60(b) aside and

properly held that the Appellee is not obligated by the terms of the agreement to arbitrate to submit a grievance to final arbitration and then be required to reopen the arbitration for the taking of further evidence. A court does not have authority to consider whether one side or the other properly or improperly submitted its case to the arbitrator, whether it well or poorly structured its strategy, or how and when it used its "persuasive" powers to produce its witnesses in the one arbitration. A court neither agrees nor disagrees with the employer or union that additional evidence warrants or merits consideration. It simply does not remand such a case or set it aside.*

C. Appellant Once Again Has Clearly Entangled Itself in the Merits of the Arbitrator's Award, the Credibility of Witnesses, and the Weight of Testimony. It Is Asking This Court to do the Same

The arbitrator has already concluded from Mrs. McLendon's own testimony that Mrs. Chatham did not give her permission to use the written report without attribution. Arb. Dec. p. 4. App. pp. 9, 10. The Court cannot get into the merits of the case and even if it were to do so, it is Appellee's position that there is nothing in Mrs. Chatham's affidavit which contradicts the findings of the arbitrator or would add to or subtract from it in any way.

When Appellant cites *Moore's Federal Practice* to the effect a court may act under Rule 60(b) "*when the evidence is of such a material and controlling nature as would probably induce a different conclusion,*" (italics supplied), the Appellant is clearly asking the Court to look at the merits of the case as though it were trying the issue that was in arbitration. *Moore's Federal Practice* may be quite right when Moore is talking about a judicial trial, but Moore is not talking about labor arbitration.

* A claimant may not voluntarily submit his claim to arbitration, await the outcome, and if the decision is unfavorable, then shift his ground, trial strategy or presentation and seek a second opportunity to present its case whether before an arbitrator or a court. See, *Fieck v. Southern Pacific Company, supra*.

In *Todd Shipyards, supra*, the court said:

"But the power to remand should not be exercised unless there is patent ambiguity in the decision of the arbitrator or the text of it is not germane to the issue presented as reflected by the record of the proceedings before him. To remand under any other circumstances would be to suggest to the arbitrator that the Court differed in opinion with the result on the merits which had been reached by the arbitrator and would constitute an intrusion upon his exclusive function to pass upon the merits of the grievance." 242 F.Supp. at 611, 612.

D. National Labor Policy Favors the Speedy and Final Resolution of the Myriad Problems That Come Up in Day to Day Administration of Collective Bargaining Agreements. It Is for This Reason That the Finality and Binding Quality of Labor Arbitration Has a Decisiveness Not Found Even in Judicial Proceedings

Arbitration is a consensual matter, and the parties do not agree that rules like 60(b) of the Fed. R. of Civ. P. will have any application to the grounds upon which a new arbitration may be ordered by a court because an arbitration is not a judicial trial. If an arbitration award is set aside, the Court does not order a new arbitration. The Court determines it is void. There is no ground here to do this. If the Court does not vacate it, then it does not remand it on the question of the merits of the award.*

In *Metal Product Workers Union Local 1645 v. Torrington*, (2 C.A. 1966), 358 F. 2d 103, the court in denying a

* By way of illustration of the absurdity and vice of the Appellant's contention, should it be possible to secure a second arbitration through no fault in the conduct of the first, the arbitrator could potentially reverse his prior decision and award reinstatement and back pay. Thus by reason of the delay in bringing the witness around to testify, the employer could be assessed back pay from the date of discharge to the end of the second arbitration. Should the Appellant say that the Arbitrator might not do that, the point is the Arbitrator could, and it is not for the court to tell him what he can or cannot do, any more than it is for the court to tell him how to look at evidence.

union's request to set aside an arbitrator's award, concluded:

"We can perceive no reason for giving it this second opportunity, since there is no basis for finding error either in the arbitrator's conclusions or in the proceedings by which he reasoned those proceedings." p. 106.

CONCLUSION

For the reasons stated herein we respectfully submit that the appeal from the two orders of the district court be denied.

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Dated: May 18, 1970

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ADDENDUM**Statutes Involved:**

From the Labor-Management Relations Act, as amended,
(61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 185(a).

Section 301(a) reads as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

REPLY BRIEF

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,398; 23,980

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
Local 35, Appellant

v.

THE WASHINGTON POST COMPANY, *Appellee*

On Appeal from the Decision of the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 18 1970

Nathan J. Spelman
CLERK

June 1, 1970

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,398; 23,980

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
LOCAL 35, *Appellant*

v.

THE WASHINGTON POST COMPANY, *Appellee*

On Appeal from the Decision of the United States District
Court for the District of Columbia

REPLY BRIEF

**I. The issue of whether the arbitrator exceeded the scope of
his authority**

Appellee's brief confuses this issue almost beyond recognition. To reduce the issue to its fundamentals, let us assume, *arguendo*, that an employer discharges an employee for certain misconduct which it deems "gross". Let us further assume the employer states explicitly that he would not have discharged this employee if the misconduct had

not been gross. And let us also assume that—as in the instant case—the discharge is submitted to arbitration under a collective bargaining agreement which provides that there shall be no discharge except for “good and sufficient” cause.

On the above facts, the arbitrator proceeds to hearing and, on the basis of the evidence, finds that the misconduct of the employee was not “gross”, as charged by the company. At that point, it is obvious beyond the need for argument, that the authority of the arbitrator has been exhausted, and the employee is entitled to reinstatement. Certainly, the arbitrator cannot go on to uphold the discharge on the theory that the misconduct in question—though not “gross” as charged by the company—was nevertheless misconduct which in *his* view constituted “good and sufficient” cause for discharge. The reason he could not do so—on the basis of our assumed facts—is that the employer had stated explicitly that the employee would not have been discharged if the misconduct had not been “gross”. Thus, for the arbitrator to go beyond the basis of the employer’s discharge decision would clearly exceed his authority and, would, in the words of the Supreme Court, amount to administering “his own brand of industrial justice”—a kind of action forbidden to an arbitrator.

Now let us change the facts slightly and bring them within the precise ambit of the instant case. Let us assume the employer discharges the employee on the ground that it considers the misconduct to be “gross”, but it says nothing as to whether or not it would have invoked the penalty of discharge if it had not considered the misconduct to be “gross”.

Insofar as the scope of the arbitrator’s authority is concerned, the result is the same. His first function is to determine whether the misconduct on which the discharge was based was, in his judgment, “gross”. If his answer to that question is in the negative, his authority ends and the em-

ployee is entitled to reinstatement. The arbitrator certainly cannot go on to hold that, even though he finds the misconduct not to be "gross", he is upholding the discharge because, in *his* view, the misconduct was sufficient to constitute "good and sufficient" cause for discharge. Such ruling would be plainly outside the scope of his authority; and it would amount to administering "*his* own brand of industrial justice" because the employer had never indicated, one way or the other, that it would have fired the employee even if it had not considered the misconduct to be "gross". In an arbitration case, it is the employer's brand of industrial justice which is at issue, not the arbitrator's.

This is no mere exercise in logic—although we submit the logic is ineluctable. It is, first, a matter of procedural due process, for when parties agree to submit issue X to an arbitrator, the arbitrator may not go beyond that point and encompass issue Y. But it is also a matter of substantive due process, for an employer might well invoke the ultimate penalty of discharge for misconduct it deemed "gross", but impose a much lesser penalty (warning, limited suspension, etc.) for misconduct of a lesser degree. This would be particularly true where, as here, the employee in question was a 13-year veteran of unblemished record. Thus, an arbitrator who would find the misconduct not to be gross but nonetheless uphold the discharge, would be usurping the role of the employer and depriving the employee of a basic and substantive right, namely, the right to have this issue (i.e., whether to discharge for *non-gross* misconduct) determined initially by the employer.

Appellee attempts to rebut this argument by contending that there were (by implication) *two* issues submitted to the arbitrator in the instant case. *One*: was Winzola McLendon guilty of "gross misconduct", as charged by the company? *Two*: if not, was she nevertheless guilty of misconduct which, though not "gross", amounted to "good and sufficient" cause for discharge under the contract.

Where does appellee find this second issue? Certainly not in its own letter setting forth the grounds of discharge which states: "... you were discharged on October 19, 1967, for gross misconduct ..." [App. 146]. Certainly not in appellant's letter to the American Arbitration Association submitting the issue to arbitration in the following words: "... the Guild hereby moves to submit the question of the discharge of Winzola McLendon, a women's page reporter, for 'gross misconduct' to arbitration". [App. 146] And certainly not in the arbitration hearing or in its post-hearing brief to the arbitrator, for, as noted in appellant's main brief, not one *single* word was ever mentioned about this so-called "second" issue. Indeed, the "second" issue was mentioned for the *first* time in the District Court in appellee's response to appellant's complaint challenging the authority of the arbitrator.

Appellee claims to find this "second" issue within the terms of the collective bargaining contract. Thus, appellee points to Article XVII (Grievance Procedure) of the contract which provides: "In a dispute arising from a discharge of an employee, the Authority of the Arbitrator shall be that specified in Article VI of this agreement." [App. 96b] And then it points to Article VI (3) which is set forth in footnote #1 below.¹

¹ "(3) No employee shall be discharged except for good and sufficient cause. Discharge of new employees with less than six (6) months employment shall not be subject to review by the Standing Committee. Two weeks' notice in advance of discharge shall be given to employees with six (6) months or more of continuous employment except in cases of discharge for willful neglect of duty or gross misconduct. Any such employee upon receipt of notice of discharge, or upon discharge where no notice is given, may apply to the Standing Committee so that the Committee may confer with The Post in the case. If, upon conference, a discharge is found by mutual agreement not to have been based on good and sufficient cause, The Post shall restore the discharged employee to his position, with full pay for the period from the date of discharge to date of reinstatement and with service record unimpaired.

Conferences regarding any discharge shall proceed with due diligence and shall be concluded within thirty (30) days after the notice of discharge or

Now, there is no doubt—and we freely acknowledge—that those two issues *could* have been submitted to the arbitrator. Certainly the scope of an arbitrator's authority under the contract is broad enough to encompass those two issues—*provided* (and the word "provided" is the heart of the matter) that the two issues were in fact submitted to him.

For example: let us assume (as we did at the outset) that the employer based the discharge on grounds of gross misconduct, while specifically stating it would not have invoked this supreme penalty if the conduct had not been gross. In these circumstances, no matter how broad an authority is spelled out for the arbitrator in the contract, his actual authority in the particular case is defined by the issue submitted to him; and that issue is limited to the question of "gross misconduct". And the same thing is true where the employer discharges for "gross misconduct"

after discharge where no notice is given. If, upon conference, The Post and the Guild are unable to agree as to the proper disposition of the case within thirty (30) days after notice of discharge, or after discharge where no notice is given, the matter may be referred by the Guild to arbitration under Paragraph (2) of Article XVII of this Agreement within fifteen (15) days after the end of such thirty (30) day period. If the Arbitrator renders an award that the discharge was not for good and sufficient cause, The Post shall be obligated either (a) to restore the discharged employee to his position with full pay for the period from the date of discharge to the date of reinstatement and with service record unimpaired, or (b) at the option of The Post to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI and a dismissal indemnity computed in accordance with the following schedule:

Period of Service

Dismissal Indemnity

[schedule omitted]

The dismissal indemnity shall be computed on the basis of the highest regular weekly salary received by the employee during the two (2) years next preceding the termination of his service. If the Arbitrator renders an award holding only that the discharge was not for willful neglect of duty or gross misconduct, The Post shall be obligated to pay the discharged employee any sums due him at the time as severance pay under Article X of this Agreement and as payment in lieu of notice under this Paragraph (3) of this Article VI."

and says nothing—one way or the other—about whether it would have invoked the supreme penalty if the misconduct had not been “gross”. In both instances, the so-called “second” issue (i.e., the alternative ground for discharge) was not submitted to the arbitrator and hence is not within the ambit of his authority.

True, Article VI(3)—on which appellee relies—does contain, in its last paragraph, language indicating that an arbitrator might reject a charge of gross misconduct but nevertheless uphold the discharge on grounds that the misconduct, though not gross, was sufficient to constitute “good and sufficient” cause. But obviously, this alternative ground for upholding the discharge cannot be exercised by the arbitrator unless the parties have in fact submitted that alternative issue. Or stating the proposition in appellee’s terms: *if* the so-called “two” issues had been submitted, the authority of the arbitrator to uphold the discharge on the second or alternative ground would be clear. But if only a single issue were submitted (i.e., was the employee guilty of “gross misconduct”?), the arbitrator’s authority would be limited to that single issue, no matter how broad the contract language defining the arbitrator’s authority.

An analogue to this proposition exists in the relationship between statute and Constitution. The scope of a statute is not necessarily as broad as the Constitution, unless Congress intended to go the full Constitutional distance. And the scope of an issue submitted to an arbitrator is not necessarily as broad as the contractual definition of an arbitrator’s authority unless the parties intended to go the full contractual distance.

So, in the last analysis, the question boils down to this: did the parties submit one issue, namely, was Mrs. McLendon guilty of gross misconduct? Or did they submit two issues, namely: (1) was she guilty of gross misconduct; and (2) if not, was she nevertheless guilty of misconduct

which, though not gross, constituted "good and sufficient" cause for discharge.

Appellant submits that the record is overwhelmingly clear that only the one issue was submitted, and only that issue was litigated. Appellee's effort to justify the arbitrator's exercise of authority over the "second issue" by its ex post facto reasoning is unfair, unsound, and legally unacceptable.

II. Can Rule 60(b), F. R. Civ. P. be invoked to set aside an order enforcing an arbitration award and to remand cause for a new arbitration hearing?

Appellant's principal contention is that this Court should affirm the award of the arbitrator insofar as that award finds Mrs. McLendon not guilty of the charge of gross misconduct, for that finding, is by admission, clearly within the ambit of the arbitrator's authority. Appellant then contends that the rest of the award (i.e., the portion upholding her discharge on grounds other than gross misconduct) should be set aside as outside the scope of his authority and Mrs. McLendon reinstated to her position.

Only in the event that that contention is rejected do we reach the issue of whether this Court should, pursuant to Rule 60(b), F. R. Civ. P., set aside the District Court's order enforcing the award and remand the case for a new arbitration hearing on the ground of the newly available evidence (i.e., the critical testimony of Mrs. Patricia Firestone Chatham).

Appellee's argument that Rule 60(b) may not be applied to accomplish this goal in an arbitration case is entirely without merit.

1. First, appellee's contention that appellant is seeking to use Rule 60(b) as an indirect device to achieve a review by this Court of the merits of the award is obviously spurious. Review of the award is not what is involved in appellant's Rule 60(b) motion. Appellant is invoking Rule 60(b) simply for its historical purpose of vacating

a judgment which (however correct when issued) has, through the fault of neither party or the arbitrator, become unjust as a result of developments subsequent to that judgment. Specifically, appellant is asking the Court to cure that injustice by invoking the traditional remedy under Rule 60(b)(6), namely, vacating the judgment and ordering a new hearing.

Thus, the principles defining the scope of review of an arbitration award—argued at such length by appellee—have no bearing whatever on the motion under Rule 60(b).

2. Appellee next argues that, while this Court has the power, under Rule 60(b), to set aside the order of the District Court enforcing the award, it has no power to remand the cause for a new arbitration hearing.

That argument misreads both the scope and purpose of Rule 60(b). It is established law that the district courts are empowered under Section 301 of the Labor-Management Relations Act, 29 U.S.C.A., Sec. 185, et seq. (hereafter LMRA) to decree specific performance of an agreement to arbitrate a grievance dispute.²

It is also established law that, where an award of an arbitrator on an issue submitted by a union and an employer in accordance with a collective bargaining agreement has been set aside due to no fault of the union or the employer, there has been no arbitration of the issue, as required by the contract, and resubmission of the issue to arbitration is required. *Public Utility Const. and Gas Appliance Workers of State of N. J., Local 274 v. Public Service Elec. and Gas Co.*, 114 A. 2d 443, 35 N.J. Super. 414. This, of

² In the leading case of *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 942, the Supreme Court held that, pursuant to Section 301 of the Labor-Management Relations Act, the federal district courts are empowered to issue mandatory injunctions requiring parties to submit to arbitration under the terms of a collective bargaining agreement. In the instant case, of course, it is undisputed that the discharge in issue was required to be arbitrated under the terms of the collective bargaining agreement.

course, is a rather self-evident proposition, for otherwise the disputed issue would remain unarbitrated and thus unresolved, in contravention of the contract requirements and of the Congressional policy embodied in Section 301 of LMRA (as shown in the *Lincoln Mills* case, *supra*, footnote 2).

In light of the above principles and precedents, it is plain that, if this Court should, pursuant to Rule 60(b), vacate the District Court's Order of June 9th enforcing the arbitration award, the situation would then be the same as though there had been no arbitration of the issue, and the Court would have the right under Section 301 of LMRA—indeed, the statutory duty—to order the disputed discharge to be resubmitted to arbitration in accordance with the terms of the contract. Such an order would be mandatory under Section 301 of LMRA, and also in complete harmony with Rule 60(b) which provides that the court may relieve a party from a final judgment, order or proceeding “upon such terms as are just.” In the instant case, the only just terms would be to order a new arbitration. Certainly the court could not simply vacate the order enforcing the award and then leave the disputed discharge in unresolved limbo.

3. Appellee further contends, on the basis of *LaValle Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F. 2d 569 (3rd Cir. 1967), that a discharge cannot be remanded for a new arbitration, because, once an arbitrator has made his award, his authority is exhausted and he is *functus officio*, with no authority to deal further with the dispute.

But this principle of “*functus officio*” has nothing whatever to do with the remedy appellant seeks in the instant case. As noted earlier, this Court can set aside the arbitration award and, pursuant to both Section 301 of LMRA and to Rule 60(b), can order a new arbitration hearing. The situation at that point is the same as though there had been *no* arbitration. [*Public Utility Const. and Gas*

Appliance Workers, etc. v. Public Service Elec. & Gas Co., 114 A. 2d 443, 35 N.J. Super. 414]. Thus, to order a new arbitration obviously does not collide with the doctrine of *functus officio*, for the former arbitrator would not be asked to resume his authority over the dispute; the arbitral slate would have been wiped clean and a new arbitrator would be selected to hear the cause *de novo*.³

4. Next, appellee tries to make the decision in *Bridgeport Rolling Mills Company v. Brown* (2 C.A. 1963), 314 F. 2d 885, cert. denied, 375 U.S. 821, stand for the proposition that Rule 60(b) is not applicable to arbitration awards.

But the fact is that the case stands for just the opposite proposition. In that case, the employer who lost an arbitration case filed a motion under Rule 60(b) to have the award vacated and a new arbitration ordered, on the ground of newly discovered evidence and fraud. The trial court did *not* find Rule 60(b) inapplicable. As the Court of Appeals notes in the decision: "The trial court held that the employer's affidavits [in support of the Rule 60(b) motion] failed to satisfy the employer's burden of proof." The plain and only implication of this holding is that Rule 60(b) *would* have been applied if the newly discovered evidence *had* been strong enough to sustain the burden of proof. If the trial court (or the appellate court) had considered Rule 60(b) to be inapplicable, it would never have reached the issue of the adequacy of the affidavits filed in support of the employer's motion; it would simply

³ Even assuming *arguendo* that *functus officio* did present some problem, it is certainly not the kind of absolutest doctrine for which appellee contends. In *LaValle Plaza*, on which appellee relies, the court makes a statement which demonstrates that some erosion of that doctrine must be deemed to have occurred. The court states that the policy of finality on which *functus officio* is based "came [from] the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." Certainly such a doctrine must be deemed to have undergone some relaxation under the terms of Rule 60(b), or else Rule 60(b) would be a nullity. The ancient doctrine of finality said "a [final] judgment . . . was unalterable even for the correction of a manifest mistake." Rule 60(b) says a final judgment, order or proceeding is alterable for the correction of a manifest mistake.

have dismissed on the ground that Rule 60(b) did not apply.⁴

5. Appellee further contends that Rule 60(b) is available only where "a final judgment of a federal court" is involved, but not "the final award of an arbitrator."

But the language of Rule 60(b) itself rebuts any such restrictive reading of the Rule. It states that "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding . . ." Thus, for example, in *McDowell v. Celebreeze*, 310 F. 2d 43, the trial court, acting pursuant to Rule 60(b) vacated its final judgment which had affirmed the ruling of an administrative body. And the same is true in *Block et al. v. Thousandfriend et al.*, 170 F. 2d 428; and *In the Matter of Richard V. Helman*, 109 U.S. App. D.C. 375, 288 F. 2d 159.

As the Committee on Rules has pointed out: Rule 60(b) "will deal with the practice in every sort of case in which relief from final judgment is asked, and prescribe the practice." *Moore's Federal Practice*, Vol. 7, page 4010. And as the Rule itself states, it was designed, *inter alia*, to provide all the relief formerly provided by a whole series of common law writs, including the writ of *audita querela*. The latter "is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath a good defense, is too late to make it in the ordinary forms of law." *Moore's Federal Practice*, Vol. 7, Sec. 60.13.

Since this Court, as stated in *Lincoln Mills* (353 U.S. 448), has the duty to fashion a body of national labor law under Section 301 of LMRA; and since Rule 60(b) which

⁴ Moreover, in *Bridgeport Rolling Mills*, the situation was the very opposite of the present case. There, as the court specifically notes, the moving party (i.e., the employer) had a remedy without the help of Rule 60(b)—namely—he could now discharge the employee on the newly discovered evidence and/or fraud. In the instant case, the moving party (i.e., the discharged employee) has no such remedy. Her sole remedy is a new arbitration; and the only way she can achieve that remedy is through the use of Rule 60(b).

governs all federal litigation expresses a national policy of remedying injustices arising after judgments or proceedings have become final (and therefore otherwise unremediable) it follows that Rule 60(b) should not be read to exclude the process of arbitration from the correction of inequities arising after final ruling.

6. Next, appellee argues there would never be an end to arbitration if Rule 60(b) were available to order new hearings. The best and most decisive answer to this kind of argument was given by Justice Oliver Wendell Holmes. Confronted with the argument of a litigant that "the power to tax is the power to destroy", Justice Holmes answered: "Not so long as this Court sits". The fact that Rule 60(b) is available to correct egregious injustices does not mean the Court is obliged to grant every motion made pursuant to it. The burden is on the moving party to demonstrate his entitlement to relief, and that burden is a substantial one. But to completely and unequivocally banish Rule 60(b) from the area of arbitration—no matter to what degree subsequent events have rendered the award unjust and destructive—is to burn down the barn to roast the pig.

7. Finally, appellee argues that this Court should simply "put aside" Rule 60(b) because national labor policy favors the speedy and final resolution of arbitration disputes.

But no Federal Court can simply "put aside" a Federal Rule of Civil Procedure. Granted there is a federal policy favoring expedition and finality in arbitration awards; but there is also a federal policy expressed in Rule 60(b) favoring the remedying of serious inequities arising *after* a judgment or order or proceeding becomes final. And therefore, the Court should not put aside either of those policies but should balance them on the basis of the circumstances of the particular case. Thus, in the instant case, the relevant balancing question is: Is it more important that the interest of finality be served by refusing

to vacate the order enforcing the award; or is it more important that the interest of fairness and justice be served by directing a new hearing in order that the critically material testimony of Mrs. Patricia Firestone Chatham may be heard and considered.

Appellee argues for finality in the kind of absolutest terms which are wholly at odds with the equitable principles underlying Rule 60(b). Rigid generalizations are entirely inapposite in determining the availability of Rule 60(b), for it is a rule which encompasses *every* method available under common law equitable principles—and more—for correcting inequities arising in a particular case *after* an order or proceeding has become *final*. *Moore's Federal Practice*, Vol. 7, Sec. 60.13. In the words of the Committee on the Rules: "... [Rule 60(b) will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice.]" *Moore's Federal Practice*, Rule 60 at page 4010.

To argue, as appellee does, that Rule 60(b) is not applicable to arbitration awards because of the doctrine of finality is, on its face, a meritless argument, for it is precisely and solely with *final* judgments, orders and proceedings that Rule 60(b) is concerned; and its sole purpose is to provide relief against finality when—as here—subsequent events have rendered that finality unjust.⁵

In effect, appellee is arguing that Rule 60 was intended to correct inequities in all situations except arbitration. There is not a shred of statutory language or legislative

⁵ Appellant does not seek to bring revolution into the arbitration arena, for quite aside from Rule 60(b) and notwithstanding the doctrine of finality, arbitration awards are reviewable on many grounds: (a) the award is outside the scope of the arbitrator's authority; (b) the award is arbitrary and capricious; (c) the arbitrator refused to admit relevant and material evidence; (d) fraud or corruption; (e) ambiguity; and (f) in certain limited circumstances, errors of law. There are no absolutes in the world of law such as appellee is contending for; certainly not where the result is the destruction of equitable principles.

history to which appellee has pointed to support the reading of such exception into the Rule. To the contrary, Rule 60(b) is, as Professor Moore has characterized it, "the grand reservoir of equitable power to do justice in a particular case. . . ." *Moore's Federal Practice*, Vol. 7, Sec. 60.27 [2], at page 308.

* * * * *

There are two more comments to be made with respect to appellee's arguments on Rule 60(b).

One: Appellee complains that a new arbitration could involve an unreasonably high amount of back pay because of the long time lapse since the discharge.

This is not an argument germane to the present issue. It is an argument to be directed to the discretion of the new arbitrator in the event he should direct Mrs. McLendon to be reinstated to her job. And in that event, under familiar rules, an arbitrator will deduct from back pay all interim earnings. Moreover, an arbitrator has the discretion to deny back pay altogether; or to reduce it on various equitable grounds. But to argue that there should be no rehearing at all because of the possibility of too high an award of back pay amounts to throwing the baby out with the bath.

Second: In an effort to downgrade the potential significance of the newly-available testimony of Mrs. Patricia Firestone Chatham, appellee makes the outlandish statement that: "The arbitrator has already concluded from Mrs. McLendon's own testimony that Mrs. Chatham did not give her permission to use the written report without attribution." [Appellee's brief, p. 28].

The very opposite is the case. The arbitrator did not reach the above-recited conclusion in *reliance* on Mrs. McLendon's testimony. On the contrary, he reached this conclusion by *discrediting* her testimony. And this is the very reason that Mrs. Chatham's testimony is critical.

Mrs. Chatham is the *only* person who can give independent testimony that she did, indeed, give Mrs. McLendon full permission to use the material, without attribution, and did so in a manner that made Mrs. McLendon's reliance thereon perfectly reasonable and sincere. [See Affidavit of Patricia Firestone Chatham, Appellant's Brief, pp. 19-21].⁶

III. Did the grievant's acceptance of severance pay preclude her judicial challenge to the validity of the award?

Appellee makes the argument (page 15 of its brief) that, in accepting severance pay, the grievant accepted the award and, presumably surrendered her right to appeal its validity to this court.

To begin with, this argument was made by appellee in the District Court and, by implication, was rejected. If the District Court had considered it a valid argument, the Court would never have reached the issues on which it based its rejection of appellant's position. But the Court did not even mention the argument, much less credit it.

The fact is, as shown by the affidavit of Ira M. Lechner (the attorney who represented Mrs. McLendon in the arbitration) [App. 204], there was never any discussion, much less an agreement (implied or express), on surrendering the right to challenge the award in court. Following the award, a dispute arose as to the amount of severance pay owing to Mrs. McLendon and the parties met to confer on the question. But the only thing the parties discussed was the amount of severance pay and

⁶ Equally outlandish is appellee's statement [Appellee's brief, p. 28] that "... there is nothing in Mrs. Chatham's affidavit which contradicts the findings of the arbitrator or would add to or subtract from it in any way." As her affidavit shows, Mrs. Chatham will testify that she specifically authorized Mrs. McLendon to use the Blue report, without attribution; that she did not advise Mrs. McLendon that the report had been prepared for the Fine Arts Commission and nothing in the report itself indicated that fact; and that she (Mrs. Chatham) made these statements in the belief that she had the right to do so. This testimony directly contradicts *three* of the basic findings on which the arbitrator found Mrs. McLendon guilty of misconduct justifying discharge.

the only thing they agreed upon was the amount of severance pay.

Indeed, as stated by Mr. Lechner in his affidavit: "... at the conference (of the parties regarding severance pay) I informed Mr. Kennelly (Washington Post labor relations director) that the Guild was studying the Arbitrator's Award for the purposes of appeal to this Court and both Mr. Kennelly and I agreed that the conference (on the severance pay dispute) was without prejudice to our respective legal positions." [App. 204-5]

To hold that Mrs. McLendon or the Guild lost the right to challenge the award because the company paid and she accepted the severance pay would be the equivalent of holding that a party who pays a judgment in District Court loses the right of appeal on the theory that payment of the judgment constitutes acceptance of the judgment, and a waiver of the right to challenge it on appeal. There is no such doctrine.

The dispute in this case is not over how much appellee owed Mrs. McLendon; it is over the justness of her discharge. The severance pay is only an incident to that discharge. If the award is set aside by this court and Mrs. McLendon is ultimately reinstated to her job, she of course would be required to restore the severance to appellee, just as a party who prevails on appeal is entitled to a refund of the money judgment he paid to the other party in the trial court.

Respectfully submitted,

SPELMAN, LECHNER AND WAGNER

By SEYMOUR J. SPELMAN

Counsel for Appellant

June 1, 1970.

